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(CANADA)

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JANUARY—APRIL, 1912.

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EDWARD B. BROWN, K.C.

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# Western Law Reporter

VOL. XX. TORONTO, FEB. 27, 1912. No. 1

## MANITOBA.

MACDONALD, J. FEBRUARY 6TH, 1912.

TRIAL.

### ROGERS v. GRAND TRUNK PACIFIC R. W. CO.

*Railway—Injury to Animals on Track—Liability—R. S. C. 1906 ch. 37, sec. 294, sub-sec. 4—Onus—Evidence.*

***Held***, upon the evidence, in an action to recover damages for the loss of four horses, that the horses were killed or injured by being struck by an engine of the defendants running on their line of railway; and that the defendants had not discharged the onus which was upon them, under sub-sec. 4 of sec. 294 of the Railway Act, R. S. C. 1906 ch. 37, of proving that the animals got at large through the negligence or wilful act or omission of the owner or his agent.

Action to recover damages for the loss of four horses.

W. H. Trueman, for the plaintiff.

J. Auld, for the defendants.

MACDONALD, J.:—The plaintiff occupies the east half of section 10, township 12, range 19, west of the first principal meridian, and the line of the defendants runs through it.

On the 12th or 13th December, 1911, five horses, the property of the plaintiff, strayed on to the defendants' track, and on the 13th December they were found on the side of the track, one dead and three others so injured that it became necessary to destroy them; the fifth escaped; and the plaintiff brings this action claiming damages for the loss of the four horses.

Although there was no eye-witness to the running down of the horses by the defendants, yet I have no hesitation in finding that the injuries sustained, with the results that



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followed, are attributable to the animals being struck by an engine of the defendants running on their line of railway.

One of the defendants' witnesses says that the 7.30 train was the one that did the damage.

Section 294, sub-sec 4, of ch. 37, R. S. C. 1906, provides: "When any horses, sheep, swine, or cattle at large, whether upon the highway or not, get upon the property of the company and are killed or injured by a train, the owner of any such animal so killed or injured shall, except in the cases otherwise provided for by the next following section, be entitled to recover the amount of such loss or injury against the company in any action in any Court of competent jurisdiction, unless the company establishes that such animal got at large through the negligence or wilful act of the owner or his agent or of the custodian of such animal or his agent."

The exception in the cases otherwise provided for by the next following section referred to in the above section has no application here.

It is conceded by counsel for the defendants that, to entitle them to succeed, the onus is upon them of proving that the animals got at large through the negligence or wilful act or omission of the owner or his agent.

The question is, therefore, one purely of fact.

The plaintiff kept the horses in an enclosure surrounded by a wire fence, four feet high; this enclosure is about one half a mile from the defendants' track. The horses escaped from this enclosure; and it is asserted by the defendants that such escape was through the negligence or wilful act or omission of the plaintiff, in not having his fences in proper condition or repair, but having them in such a condition as to be unfit to hold within their enclosure any animal.

Now what is the evidence of negligence against the plaintiff?

His own evidence is, that, on the evening of Saturday the 11th December, the horses were placed within this enclosure, where they had been for three weeks previous to this date; a poultry-house stands at a point about the centre of the south fence of the enclosure; to the east of this poultry-house, stands a tree a few feet distant; and between this house and tree is the gap through which ingress and egress could be had to the enclosed field. When the horses were placed within the enclosure, this gap was closed up by boards to the heigh of 50 inches. The plaintiff says that on

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the evening of the 11th December, about dark, he fed the horses in this enclosure, and the gap between the house and the tree was closed. In the morning, he discovered the boards closing, the gap broken down, and the horses gone. That the plaintiff and his family made diligent search immediately there is no doubt. The animals wandered in different directions, finally getting on to the railway track at a crossing of the road allowance north-west of the plaintiff's farm, and at this crossing there were no cattle-guards, as required by the Railway Act. A short distance west of this point on the track, the horses were found in the condition mentioned.

For the defence, William D. Hayes is the principal witness. He was engaged by the plaintiff as a farm labourer, taking care of the horses, cattle, etc. He went to the plaintiff's place on the 10th December, 1910, but he says he never saw the horses in question there. In referring to the fence surrounding the enclosure where the horses had been kept, he says there was an opening, and that during the three months he was there he never saw it closed, and there was no gate through which the cattle passed. There also was an opening at the poultry-house, where he was told the horses had broken through, and this also, he says, was down all the time he was there. These were the only openings in the enclosure; and, although he says this was the condition of the fence during all the time that he was there, I am satisfied that he knows nothing of the conditions prior to the horses breaking through; and, although he went to the plaintiff's on the evening of Saturday the 10th, it seems to me unreasonable that he would take such note of the fence and its openings on the day following, which would be Sunday, and the ordinary routine of work not followed, as would enable him to speak with any degree of certainty of conditions on the 11th, and on the evening of that day the horses escaped.

The only other witness for the defence was Robert W. Adams; and, although he condemns the plaintiff's fences, I am not quite satisfied with his testimony. On the 5th December, he called at the plaintiff's in search of a missing horse, and went to the south boundary of the 50-acre enclosure, and there were no horses within the enclosure, but he says he would not expect them there at that hour in the morning. In describing the condition of the fences, he says his heifer one day went through the fence; but, on

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cross-examination, he admitted that he did not see the animal go through, and the plaintiff's evidence that this heifer followed his herd seems the more reasonable.

I realise how difficult it is for the defendants to satisfy the onus cast upon them; but I do not think that the plaintiff here was negligent, or at any rate, if he were, the evidence does not, to my mind, sufficiently establish that fact.

Judgment for the plaintiff for $600 with costs.

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## MANITOBA.

MACDONALD, J. FEBRUARY 6TH, 1912.

TRIAL.

### LEWIS v. BUCKNAM.

*Principal and Agent—Agent's Commission on Sale of Land —Principal Representing Co-owners—Division of Commission—Scale of Costs—Amount Recovered.*

The plaintiff, the assignee of the claim of an estate agent for commission on the sale of certain farm lands in which the defendant, who was also an estate agent, had an undivided one-third interest, was *held*, in the circumstances set out below, to be entitled to recover the usual commission on the sale of the defendant's interest and one-half the usual commission on the sale of the interests of the defendant's co-vendors.

The plaintiff was also *held*, entitled to costs on the King's Bench scale, although she had recovered only $450, because she was justified in bringing her action in the Court of King's Bench from the fact that it was not made clear to her that the defendant was not the sole owner of all the property.

Action for commission on a sale of land.

M. G. Macneil and B. L. Deacon, for the plaintiff.

A. E. Hoskin, K.C., and G. Coulter, for the defendant.

MACDONALD, J.:—The plaintiff is the assignee of a claim of her husband, Levi A. Lewis, a real estate agent, against the defendant, who is also a real estate agent, for commission on the sale of land.

The defendant was the owner of a quarter section of land near the village of Souris, and also owned an undivided one-third interest in the north-west quarter of section 14, township 13, range 14, west of the second meridian, in Manitoba,

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the remaining interest being owned by Banbury and McVicar, of the town of Wolseley, in the province of Saskatchewan. The defendant and Lewis had, previous to the transaction leading to this action, discussed an exchange of these lands of the defendant for lands owned or controlled by Lewis; but, failing in arriving at an agreement, the defendant agreed with Lewis to pay him the usual commission if he could dispose of his (the defendant's) lands.

Some time after this, Lewis called upon the defendant and got from him a description of the farm lands, a commission on the sale of which is sought in this action.

There is some conflict as to how Lewis and the defendant entered into negotiations terminating with the disposal of the property. The latter says that Lewis first approached him with a list of the city properties, and suggested making a sale, taking in exchange as part payment the farm lands referred to; whereas Lewis says that the defendant first gave him a description of the farm lands, and that he then interviewed one Mark Faulkner, a real estate broker, who had the city properties for sale, and suggested the agreement which was subsequently entered into.

The defendant seeks to avoid liability by asserting that Lewis first came to him with a description of the city properties, suggesting that he, Lewis, was acting as the agent for the owners of said properties, and would consequently earn his commission from that source.

Lewis is corroborated by Mr. Faulkner, who says that Lewis came to him with a description of the farm lands, and that he, Faulkner, then submitted the proposition to his principal, Isenburg, for a sale of the city properties which were owned by the latter, to Lewis's principal, taking the farm lands as part payment. A description of the houses was then given to Lewis, who submitted it to the defendant, when the latter expressed approval of the proposal. A meeting of the principals was arranged by Lewis, resulting in an agreement being made whereby the defendant and the others interested in the farm lands purchased the city property, the vendor taking as part payment the said farm properties; and on the sale of the latter the plaintiff claims a commission.

The defendant admits liability for a commission on the sale of the lands which he himself owned, but resists the demand for a commission on the sale of the lands in his hands for sale for his co-vendors; he admits having been

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paid a commission of $300 by his co-vendors, but claims this for himself for his services in connection with the sale. Any services, however, that he could have performed would be necessary in connection with the disposal of his own interest in the farm property, and he had nothing to do with and was not instrumental in bringing about the agreement made.

The defendant, after the agreement was completed, called upon Mr. Faulkner and asked that the commission on both sides be divided in three parts, one-third to Lewis, one-third to Faulkner, and one-third to himself; but this Faulkner would not entertain, as he claimed the entire commission on the sale of the city properties. This conversation with Faulkner is denied by the defendant; but I think his memory must be defective. He did call upon Faulkner, and it was not a casual meeting, as he suggests; and the right of Lewis to a commission was mentioned.

The plaintiff, as the assignee of the claim of her husband, is entitled to a commission on the sale of the defendant's lands, and one-half the usual commission to which the defendant would be entitled on the sale of his co-vendors' lands. In all, there will be judgment for the plaintiff for the sum of $450; and, as I feel that the plaintiff was justified in bringing her action in this Court from the fact that it was not made clear to her that the defendant was not the sole owner of all the property, there will be costs to the plaintiff on the King's Bench scale.

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## MANITOBA.

MACDONALD, J. FEBRUARY 6TH, 1912.

TRIAL.

### GAAR SCOTT CO. v. MITCHELL.

*Sale of Goods—Payment by Instalments—Default — Repossession and Resale—Action for Balance of Price—Credit for Proceeds of Resale—Enforcement of Charge on Land.*

By an agreement for the sale of machinery by the plaintiffs to the defendant it was provided that, in default of payment of the purchase-price and obligations in full as they respectively matured, the plaintiffs might resume possession of the machinery; and the plaintiffs were

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**empowered to sell the machinery an account of the defendant, crediting the profits of the resale, after deducting all expenses incurred in resuming possession, etc.; and the defendant was to remain liable for the balance of the purchase-money and interest and all obligations given therefor. The defendant made default in payment of the last two instalments, and the plaintiffs resumed possession and sold the machinery. The plaintiffs sued for the balance due and to enforce a charge created by the defendant upon his land, to secure payment of the price of the machinery. The defendant pleaded that by resuming possession the plaintiffs had released him from all liability for the payments; but he did not, in his pleading, claim credit for the moneys realised by the resale:—**

***Held*, that the plaintiffs were entitled to judgment for the amount due under the agreement and to enforce their lien therefor by a sale of the defendant's land, without prejudice to the defendant's remedy in respect of the moneys realised by the resale.**

Action to recover a balance of the price of machinery sold by the plaintiffs to the defendant and to enforce a lien therefor on the defendant's land.

D. A. Stacpoole and L. J. Elliott, for the plaintiffs.

E. L. Howell, for the defendant.

MACDONALD, J.:—On the 28th July, 1906, the defendant, by an agreement in writing (exhibit 1), agreed to buy from the plaintiffs, and the plaintiff agreed to sell to the defendant, certain machinery, in the agreement fully described, for the price or sum of $3,700, payable in instalments as in the agreement set forth, and the defendant further agreed collaterally to secure the said payments by making his promissory notes in favour of the plaintiffs for the said sums.

The machinery was delivered to and accepted by the defendant, who gave his promissory notes as agreed, and paid four of them, amounting to one-half the purchase-price of the machinery.

The agreement provides that, in default of payment of the purchase-price and obligations in full as they respectively mature, the vendors may resume possession of the said machinery; and it empowers the vendors to sell the said machinery or any part thereof on account of the purchaser, by public auction or private sale, crediting the net proceeds of such resale, after deducting all expenses incurred in resuming possession, etc.: and the purchaser shall remain liable for the balance of such purchase-money and interest and all obligations given therefor.

The defendant, for the purpose of further securing to the plaintiffs the payment of the purchase-price, created a

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charge or lien upon the north-east quarter of section 14, in township 37, in range 27, west of the first principal meridian in Manitoba, for the sum of $3,700.

The defendant made default in payment of the two final instalments of purchase-money represented by the two promissory notes sued on herein, with the exception of $200 paid on the note in the statement of claim firstly-mentioned.

The plaintiffs further allege that they have endeavoured to resume possession of the said machinery, pursuant to the provisions of the said agreement, but that the defendant has refused and still refuses to allow the plaintiffs to resume possession of the same.

In his statement of defence it is alleged that the plaintiffs did not deliver to the defendant certain articles, part of the machinery agreed to be sold, and it appears from the evidence that there were several articles omitted, but the defendant says that this and other differences were settled before this action was brought, so that the defendant does not rely or insist upon that fact as a defence in abatement of purchase-price or otherwise.

The defendant further alleges that the plaintiffs have resumed possession and taken from the defendant the machinery in question, and claims that by reason thereof he has been released from all liability under the agreement and promissory notes referred to in the statement of claim.

I find, however, that the agreement has not that effect, as it provides that the plaintiffs may resume possession and resell, holding the purchaser liable for any loss on a resale.

There is no abatement of purchase-price claimed in the defence to the action, although it appears from the evidence that the plaintiffs have, since resuming possession, made a sale of the machinery for the sum of $1,900; but, as this is not raised by the pleadings, I cannot give effect to it, for the plaintiffs might be entitled to a possible reduction of that credit, for costs incurred in resuming possession or repairs to the machinery to make it saleable.

The defendant will, however, be left to his remedy in connection with this resale.

There will be judgment for the plaintiffs for the amount sued for, together with costs, and they will be entitled to a charge or lien upon the lands described in paragraph 8 of their statement of claim and to a sale of the defendant's interest in the said lands.

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## MANITOBA.

MACDONALD, J. FEBRUARY 6TH, 1912.

CHAMBERS.

## SMITH v. MURRAY.

*Evidence — Foreign Commission — Nature of Evidence Sought—Materiality—Affidavit.*

Upon an application for the issue of a commission to examine witnesses abroad, it is not necessary that the nature of the evidence or facts intended to be proved should be shewn.

In an action for a commission on the sale of land, it was *held*, that the plaintiff's affidavit stating that certain named persons, residing in the United States of America, were material and necessary witnesses on his behalf, and without their testimony he could not safely proceed to trial, and that they could prove facts and circumstances which would shew that the sale of the land was made through the plaintiff's instrumentality, was sufficient to shew the materiality of the evidence sought; and an order for a foreign commission was properly granted.

Appeal by the defendants from an order of the Referee in Chambers granting a commission for the examination of witnesses in the United States of America on behalf of the plaintiff.

E. A. Cohen, for the defendants.

N. F. Hagel, K.C., for the plaintiff.

MACDONALD, J.:—The principal grounds of objection taken are:—

1. That the evidence proposed to be obtained is not material to the issue.

2. That there was not sufficient material before the Court to shew what evidence was proposed to be given.

On the first objection it is urged that the statement of claim discloses the fact that the agreement to pay the commission sought to be recovered was made on the 10th November, 1909, and that all previous services rendered by the plaintiff were voluntary and not under any arrangement or understanding with the defendants, and that the only material evidence that can be had is such as relates to the agreement of the 10th November, 1909, to pay the commission.

Although the statement of claim might be more explicit, I think it is fair to assume that the plaintiff was en-

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deavouring to effect a sale as agent for the defendants for some time prior to the 10th November, 1909; and that on the latter date, the prospects of his success being bright, the agreement as to the amount of the commission to which he was to be entitled was entered into.

In his affidavit in support of his motion for a commission, the plaintiff says: "Arthur H. W. Eckstein, John A. Todd, and George L. Wertman, as well as John Mack and William Mack, resident at or near the city of Minneapolis, in the United States of America, are, as I believe and am advised by my solicitor, material and necessary witnesses for me in this action, and without their testimony I cannot safely proceed to the trial of this action. The said witnesses can prove, according to the best of my information and knowledge, and according to a large extent to my present knowledge, facts and circumstances which will shew that the sale and purchase of the property, being real estate referred to in the statement of claim, and for the sale and purchase of which commission is claimed in this action, were made by and through the instrumentality of me, the plaintiff, and of other persons who claim an individual commission, as I do, in respect of such sale and purchase, pursuant to the terms of the agreement by which each of us was to have such individual commission in respect of such sale and purchase."

It is urged that it is not sufficiently explicit as to what the facts and circumstances are which these witnesses can prove; but it seems to me that the facts and circumstances which will establish the fact that the plaintiff was instrumental in bringing about the sale are most material, as he would have to prove this to entitle him to the commission, the amount of which he alleges was agreed upon at the later date; and, furthermore, it is not necessary that the nature of the evidence or facts intended to be proved should be shewn on an application of this nature.

From a persual of the statement of claim and affidavit of the plaintiff in support of his motion, I am of the opinion that there is a sufficient case made out to entitle the plaintiff to a commission; and I dismiss the appeal with costs in the cause to the plaintiff in any event.

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## MANITOBA.

PERDUE, J.A. FEBRUARY 7TH, 1912.

CHAMBERS.

# RE PROVENCHER DOMINION ELECTION.

*Parliamentary Elections—Controverted Election Petition—Preliminary Objections—Security for Costs—Conduct of Returning Officer Complained of—Amount of Security—Controverted Elections Act, sec. 14—Affidavit of Petitioner—Knowledge of Allegations of Petition — Sufficiency—Publication in Newspaper of Notice of Presentation of Petition—Cost of—Payment by Petitioners—Preliminary Payment to Returning Officer not Required —Status of Petitioners as Voters—Voters' Lists—Non-compliance with Statutory Directions—Preparation — Certification—Production from Proper Office.*

Upon preliminary objections to a petition, under the Dominion Controverted Elections Act, against the return of the respondent as a member for an electoral district in the House of Commons of Canada:—

*Held*, that, under sec. 14 of the Act, the $1,000 deposited by the petitioners as security was for the purpose of securing payment of the costs and expenses, not only of the member whose election or return was complained of, but also of the Returning Officer, where his conduct is complained of.

2. That, although the information of one of the two petitioners was very defective in regard to what the petition contained or the charges set forth in the various paragraphs, or even the meaning of what was charged, it could not be said that he was completely ignorant or without information as to the contents of the petition, and his affidavit in support of it was sufficient; and, in any event, the affidavit made by the other petitioner was not objected to; and, by sec. 5 of the Act, a petition may be presented to the Court by one person who had a right to vote at the election.

The *Lunenburg Case*, 27 S. C. R. 226, followed.

3. That the cost of inserting in a newspaper, published in the district, a notice that a petition has been presented against the return of the sitting member, pursuant to sec. 16 of the Controverted Elections Act, must be borne by the petitioner; Imperial Election Petition Rules, No. 12, which is in force in Manitoba; but there is nothing in the Act or in the Rule compelling the payment to the Returning Officer of the expense of inserting the notice as a preliminary to the insertion of the notice by him.

4. The Dominion Elections Act makes the Provincial lists the foundation of the Dominion Lists: sec. 6. Upon an inquiry such as this, no objection as to the regularity of the Provincial lists could be entertained: they were produced from the proper officer, and were proved to be the official lists in force. The Clerk of the Crown in Chancery at Ottawa, in order to save time, requested the Clerk of the Executive Council at Winnipeg to hand the certified copy of the Provincial voters' list to a County Court Judge at Winnipeg; and this was done, and the polling divisions defined by a committee of County Court

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Judges, pursuant to sec. 9A, sub-sec. 9, of the Dominion Elections Act, as amended by 7 & 8 Edw. VII. ch. 26; but, instead of transmitting the lists to the Clerk of the Crown in Chancery, as required by sub-sec. 10, the committee, acting on instructions from the Clerk of the Crown in Chancery, handed them, in Winnipeg, to a person sent from Ottawa by the King's Printer to take charge of the printing of the lists in Winnipeg. The printing was then done in Winnipeg, and the lists did not reach the Clerk of the Crown in Chancery till after the election:—

*Held*, that the certified list made by the County Court Judges to be transmitted to the Clerk of the Crown in Chancery was the original and legal list of voters for the electoral district. The fact that it was not transmitted by mail, but was, at the request of the Clerk of the Crown in Chancery, handed to his representative, and held by him for the purpose of being printed, did not detract from its validity. That it was printed at Winnipeg, instead of at Ottawa, did not affect the list itself. It was compiled by the County Court Judges, and now produced from the possession of the Clerk of the Crown in Chancery. It was thus a valid list of the voters entitled to vote in the electoral district; and, as the names of the petitioners appeared as voters thereon, their right to vote at the election was established.

Hearing of preliminary objections to a petition under the Dominion Controverted Elections Act.

A. B. Hudson, for the respondent.

H. P. Blackwood and A. Bernier, for the petitioners.

PERDUE, J.A.:—A petition was filed by John H. Barkwill and Paul Gagnon against the return of John Patrick Molloy as a member for the electoral district of Provencher in the House of Commons of Canada. A number of preliminary objections to the petition were filed, but on the argument these were all narrowed down to four, which may be briefly stated as follows:—

1. That the petitioners did not furnish the security for costs prescribed by the Dominion Controverted Elections Act, nor in the manner prescribed by the Act.

2. That the petitioners were not aware of the contents of the petition when they signed the same, nor were they when they made the affidavits filed therewith.

3. That the petitioners did not furnish or pay the Registrar of the Court or the Returning Officer the costs, expenses, and charges necessary for the publication of the notice of the petition, by reason whereof the same was not published by the Returning Officer in the electoral district within the time or in the manner provided by the Act.

4. That the petitioners were not persons who had a right to vote at the election, and were not candidates at the election.

In regard to the first point, it was argued that, because the Returning Officer had been made a party to the petition,

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and relief had been claimed against him, the petitioners should have furnished an additional $1,000 as security for the Returning Officer's costs. I think it is clear, from sec. 14 of the Controvered Elections Act, that the $1,000 deposited as security is for the purposes of securing payment of the costs and expenses, not only of the member whose election or return is complained of, but also the costs of the Returning Officer, if his conduct is complained of. This, I think, clearly appears from paragraphs (b) and (c) of sec. 14. By sec. 9 of the Act, a Returning Officer whose conduct is complained of is, for all the purposes of the Act except the admission of respondents in his place, to be deemed to be a respondent. I think that the security was sufficient, and that the objection should be overruled.

The principal grounds upon which the second objection was based were, that Gagnon, one of the petitioners, was not aware of the contents of the petition, had no knowledge of the facts alleged, and had no information in regard to them, and that, therefore, his affidavit was not true and was not in compliance with the Act. Counsel for the petitioners had put Gagnon in the witness-box and had asked him questions as to his having read over the petition before making the affidavit, with the object of shewing that Gagnon knew the allegations in the petition at the time he made the affidavit, and that, when he made it, he had reason to believe the allegations to be true. Counsel for the respondent was allowed to cross-examine the witness as to the fact of his having received information as to the truth of the allegations, and that he believed them. The cross-examination shewed that Gagnon's information was very defective in regard to what the petition contained or the charges set forth in the various paragraphs, or even the meaning of what was charged. It cannot, however, be said that he was completely ignorant or without information as to the contents of the petition, and he made statements as to his knowledge of some of the alleged corrupt acts charged in the petition.

I think that I must hold that the affidavit was sufficient, on the authority of The Lunenburg Case, 27 S. C. R. 226. In any event there was no such objection to the affidavit made by the other petitioner, Barkwill; and, by sec. 5 of the Act, a petition may be presented to the Court by one person who had a right to vote at the election to which the petition relates. I, therefore, overrule this objection.

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Under the third objection, it was urged on behalf of the respondent that the evidence shewed that the petitioners had not left with the Registrar of the Court or forwarded to the Returning Officer money to pay the expense of inserting a notice in a newspaper, published in the district, that a petition had been presented against the return of the sitting member, pursuant to sec. 16 of the Controverted Elections Act. That section requires the Clerk of the Court to send such a notice by mail to the Returning Officer, and it is then the duty of the Returning Officer to insert the notice once in a newspaper published in the district. The costs of inserting such a notice must be borne by the petitioner: Imperial Election Petition Rules, No. 12; Rogers on Elections, vol. 2, p. 678; McPherson's Election Law, p. 1065. There is nothing in the Act or in the Rule (which is in force here) compelling the payment to the Returning Officer of the expense of inserting the notice as a preliminary to the insertion of the notice by him. It would not be convenient that the Rule should make such payment a condition precedent, as the amount to be paid in such a case would be uncertain. The Returning Officer, as a matter of fact, did not forthwith insert the notice in a newspaper, as required, and such notice was not inserted until a considerable time after the election petition had been filed. In his evidence he explained that the cause of the delay was, that he had met with an injury which rendered him incapable of performing his duties. He stated that the non-payment of the money had nothing to do with his neglect to insert the notice. I think, therefore, that this objection also fails.

In respect of the last objection, it was argued on behalf of the respondent that it appeared from the evidence that the voters' list upon which the election took place had not been prepared in accordance with the law; and that, therefore, the petitioners had failed to shew that they were persons who had a right to vote at the election to which the petition related, and that they were not nor was either of them a candidate at the election.

On behalf of the petitioners very much evidence was put in to prove the compiling, revising, and bringing into force of the Provincial election lists, and a number of objections were urged by the respondent as to the regularity of these lists, by reason, as it was alleged, of non-compliance with several statutory requirements. The Dominion Elections Act makes the Provincial lists the foundation of the Domin

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ion lists: sec. 6. I do not think that, on an inquiry such as this, I would be justified in entertaining any objection as to the regularity of the Provincial voters' lists. They were produced from the proper officer, and were proved to be the official lists in force. I do not think I should go behind that.

It is contended by the respondent that, in the preparation of the voters' lists for the purposes of the election in question, the provisions of the Dominion Elections Act were not complied with, in that there were several departures from the express requirements of the Act; that the voters' list compiled for the electoral district of Provencher was, therefore, invalid; and that the petitioners, who relied upon the list as establishing their right to vote, had failed to prove that they had a right to vote at the election. The following facts appeared from the evidence put in by the petitioners:—

In 1911, when it was learned that a general election was to take place, the Clerk of the Crown in Chancery at Ottawa, in order to save time, requested the Clerk of the Executive Council at Winnipeg to hand the certified copy of the Provincial voters' list to Judge Myers, Judge of the County Court of Winnipeg, instead of transmitting them to the Clerk of the Crown in Chancery, in accordance with sec. 12 of the Dominion Elections Act. This was to enable the County Court Judges at once to proceed to define the polling divisions and distribute amongst the polling divisions the names of the voters entitled to vote in each electoral district, pursuant to sec. 9A, sub-sec. 9, of the Act, as amended by 7 & 8 Edw. VII. ch. 26. Judge Myers handed the certified copy to the committee of Judges appointed to define the polling places and to make the distribution of names. The committee completed their work, and made a statement shewing the limits of the polling divisions, and a copy of the lists of electors as distributed amongst the polling divisions, all duly certified. But, instead of transmitting the lists to the Clerk of the Crown in Chancery by registered mail, as required by sec. 9A, sub-sec. 10, the committee, acting on instructions from the Clerk of the Crown in Chancery, handed them, in Winnipeg, to a Mr. McGrath, who had been sent from Ottawa by the King's Printer to take charge of the printing of the lists in Winnipeg. The lists were then printed in Winnipeg, under Mr. McGrath's supervision, and in the month of October following the holding of the elections, the certified copy of the list and the statement shewing the polling divisions came to the office of the Clerk of the Crown in Chancery for the first time.

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It is argued that sub-sec. 10 of sec. 9A is imperative, the words being: "It shall be the duty of each such committee forthwith after the completion of such distribution to transmit to the Clerk of the Crown in Chancery by registered mail a statement and description shewing the limits of the polling divisions so defined and established, together with a copy of the lists of electors as so distributed among the said polling divisions certified under the hands of the members of the said committee; and the provisions of sections 13 and 14 of the Dominion Elections Act shall apply to such certified copy." It is urged that the list must be in the hands of the Clerk of the Crown in Chancery before it becomes, under sec. 14, "the original and legal list of voters," etc.

A printed list of voters for the electoral district in which the petitioners reside was put in evidence. This purports to bear the imprint of the King's Printer, and the names of the petitioners appear upon it as voters. By sec. 18 of the Dominion Elections Act, any voters' list purporting to bear such imprint "shall be deemed to be for all purposes an authentic copy of the original list of record in the office of the Clerk of the Crown in Chancery." This makes the imprint prima facie evidence of authenticity. It is argued, however, that there was not, as the evidence shews, any original list of record in the office of the Clerk of the Crown in Chancery when the list was printed; and, therefore, that the printed list cannot be taken to be an authentic copy of something that did not exist when it was printed. A question might be raised as to whether, having regard to the facts of this case, the lists were printed under the superintendence of the King's Printer in accordance with the provisions of the Public Printing and Stationery Act, R. S. C. 1906 ch. 80, having particular regard to secs. 16 and 32. The lists were not printed at the Government establishment at Ottawa, where, by sec. 16, the work is to be done. They were printed in Winnipeg, under the supervision of a person sent by the King's Printer, not under the superintendence of the King's Printer himself. If the lists were not printed under the superintendence of the King's Printer in accordance with law, then his imprint would not be sufficient authentication of them.

I think that the certified list made by the County Court Judges to be transmitted to the Clerk of the Crown in Chancery is the original and legal list of voters for the

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electoral district. The fact that it was not transmitted by mail, but was, at the request of the Clerk of the Crown in Chancery, handed to Mr. McGrath, as his representative, and held by him for the purpose of being printed, does not detract from its validity as the actual list of voters for Dominion purposes compiled by the Judges from the Provincial lists. The fact that it was not actually in the hands of the Clerk of the Crown in Chancery, but in the hands of his representative, does not appear to me to be material. There was nothing to be done to the list by the Clerk of the Crown in Chancery. He could make no changes in it. He could not add anything to it or take anything from it. It was his duty, on receiving it, to deliver it to the King's Printer to be printed. That it was printed in Winnipeg, instead of at Ottawa, does not affect the list itself. I think the list compiled by the County Court Judges, and produced from the possession of the Clerk of the Crown in Chancery, is a valid list of the voters entitled to vote in the electoral district. The names of the petitioners appear as voters on the list; and this establishes the fact of their right to vote at the election.

All the preliminary objections should be overruled. The costs will be to the petitioners in any event of the cause.

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## ALBERTA.

JUNE 17TH, 1911.

SUPREME COURT EN BANC.

## KOERMAN v. PARLEE.

*Contract—Construction — Sale of Company-shares — Payment of "Liabilities" of Company—Liability for Performance of Work Contracted to be Done — Payment of Price in Advance—Performance at Lower Cost—Measure of Liability.*

The defendants agreed to purchase from the plaintiff, for $10,000, five-sixths of the plaintiff's shares in an incorporated publishing company; and the plaintiff agreed to "pay all the liabilities" of the company, out of the "first payment of $5,000 paid to him," the plaintiff. The defendants, instead of paying the first instalment of $5,000 direct to the plaintiff, and trusting to him to fulfill his covenant to pay the liabilities of the company therewith, ascertained the names of the



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creditors and the amounts of their claims, and, with the plaintiff's consent, paid these sums, and charged the amounts thus paid against the first instalment payable to the plaintiff. Before the sale-agreement the company had undertaken to do some printing for the Government at the price of $404; and this amount had been paid to the plaintiff before the sale agreement, but the work had not been done. After the agreement, the company sublet the contract for the printing and got it done for $200, which the company paid. In adjusting the accounts between themselves and the plaintiff, the defendants retained, out of the first payment of $5,000, the sum of $404, contending that it constituted a "liability," within the meaning of the sale agreement. The plaintiff assented to being charged with $200, the amount which the printing actually cost, but not with the balance, $204, for which he sued:—

*Held* (HARVEY, C.J., hesitating), that the plaintiff was entitled to recover the $204.

Judgment of LEES, Dist. Ct.J., affirmed.

*Per* SCOTT, J.:—As the work had not been performed at the time of the sale-agreement, its performance constituted a liability of the company, which, under the terms of the agreement, the plaintiff was bound to discharge; and, the work having been done at a cost of $200, the defendante were entitled to deduct that amount, and no more, from the purchase-money.

*Per* STUART and BECK, JJ.:—In the sale-agreement the word "liabilities" meant "debts" only; and, *semble*, that the plaintiff might have claimed the whole $404; but the adjustment was an equitable one, and should not be disturbed.

*Per* SIMMONS, J.:—The defendants were entitled only to the sum of $200, which would have been the actual liability if the company had not elected to do the work and discharge the liability.

*Per* HARVEY, C.J.:—The extent of the plaintiff's liability, under his contract with the defendants, was to discharge the company's liability; the company's liability was discharged by the payment of $200; and the additional sum of $204 paid by the defendants to the company was a sum which the company was not entitled to receive, and which the plaintiff should not be charged with.

Appeal by the defendants from the judgment of LEES, DIST.CT.J., in favour of the plaintiff, in an action in the District Court at Edmonton, to recover the sum of $204, in the circumstances set forth below.

The appeal was heard by HARVEY, C.J., SCOTT, STUART, BECK, and SIMMONS, JJ.

J. R. Boyle, for the defendants.

J. T. J. Collisson, for the plaintiff.

SCOTT, J.:—The defendants agreed to purchase from the plaintiff shares to the amount of $5,000 in the Alberta Herald Publishing Company, one of the conditions of the agreement being that the plaintiff was to pay, out of the purchase-money, all of the liabilities of the company. Prior to this agreement, the company had, as the evidence shews, entered into a contract with the provincial Government to print certain Ordinances, and had been paid the contract price, amounting to $404. As the work had not been performed at the time of the agreement for the sale of the

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stock, its performance constituted a liability of the company, which, under the terms of the agreement, the plaintiff was bound to discharge. The company, with the plaintiff's concurrence, afterwards procured the work to be done at a cost of $200; and the defendants, therefore, became entitled to deduct that amount, and no more, from the purchase-money of the stock.

I cannot view the transaction in any other light than as I have stated it. The defendants contend that they are entitled to deduct the whole $404 from the purchase-money. They do not claim to be themselves entitled to any portion of it. In fact they shew that they have paid the whole amount over to the company. If this contention were upheld, the result would be that the company would be receiving $808 for work which they had agreed to perform for $404, and which they had procured to be done for $200.

In my opinion, the appeal should be dismissed with costs.

STUART, J.:—The plaintiff owned $6,000 of the paid-up stock of the Alberta Herald Publishing Company Limited. This company was, as its name indicates, engaged in a publishing business, and published a paper called the "Alberta Herald." The defendants entered into an agreement with the plaintiff to purchase from him, for the sum of $10,000, five-sixths of his shares. The agreement contained this clause: "That he, the party of the first part (i.e., the plaintiff), shall pay all the liabilities of the Herald Publishing Company Limited, which liabilities the said party of the first part hereby guarantees do not exceed the sum of $5,000, and will be fully paid and satisfied by him from and out of the said first payment of $5,000 paid to him, the party of the first part; and shall and will forthwith satisfy the parties of the second part that all such liabilities are fully paid and satisfied."

The defendants represented by their solicitor, Mr. Boyle, instead of paying the first instalment of $5,000 direct to the plaintiff, and trusting to him to fulfill his covenant to pay the liabilities of the company therewith, ascertained the names of the creditors and the amounts of their respective claims, and, with the plaintiff's consent, paid these sums and charged the amounts thus paid against the first instalment payable to the plaintiff.

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Prior to the agreement, the company had entered into a contract with the Government of Alberta to do some printing, which the Government required, for the sum of $404. This sum was paid by the Government to the company in advance before the printing was done, and before the agreement with the defendants was entered into. The company was thus under a binding contract to do some printing at the time the change in control took place, but had already received its pay therefor.

After the change in control, the company sublet the contract for the printing and got it done for the sum of $200, which the company paid.

In adjusting the accounts between themselves and the plaintiff, the defendants retained, out of the first payment of $5,000, the sum of $404, claiming that this sum was received by the company prior to the change, and constituted a liability which came within the terms of the clause above quoted from the agreement. The plaintiff assented to being charged with $200, the amount which the printing actually cost, but claimed that he should not be charged with the balance, $204. The defendants insisted that he should, and the plaintiff sued them in the District Court at Edmonton for $204, and was given judgment for that sum.

The defendants appeal.

I am of opinion that the appeal fails. The matter depends entirely upon the interpretation to be placed upon the words of the agreement. The plaintiff "covenants to pay all the liabilities of the company." He guarantees that these liabilities "do not exceed the sum of $5,000, and will be fully paid and satisfied by him from and out of the said first payment."

The question is, whether these words are wide enough to include an obligation, not to pay money, but to do a certain thing, viz., print some books. Reading the whole clause, I think its plain and obvious meaning merely is, that the plaintiff will pay the company's debts. The word "pay" is used throughout. Printing some books is not making a payment. The defendants knew that the company was carrying on a publishing business, and must have known full well that a company in that position would be under some current obligations to perform some contracts. No reference whatever is made to such matters in the agreement, and I think it would be an altogether impossible

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extension of the meaning of the words used by the parties to say that an agreement "to pay liabilities" means an agreement to print some books. To do the latter is not to make a "payment" at all.

It is true that the plaintiff assented to the retention by the defendants of the sum of $200, and only sues for the balance. All that need be said as to that is, that he was mistaken as to his legal rights. The law is clear that he is not bound in such a case. In Daniell v. Sinclair, 6 App. Cas. at p. 191, the Judicial Committee said: "The accounts were drawn up and assented to by the parties under a common mistake as to their respective rights and obligations. Their Lordships are, therefore, of opinion that the signature of a particular account, occurring in a series of accounts all alike drawn up in errer, does not prevent it being re-opened."

Neither is it competent to parties to an agreement to place a particular interpretation upon it afterwards by their own acts as distinguished from a new agreement. The rule is well known and is laid down in the Encyclopedia of the Laws of England, vol. 7, p. 384, in these words: "Evidence of admissions made by a party to a person claiming under an instrument as to the meaning of it, or of his consent after the execution of an instrument, cannot be received to alter, vary, or add to the terms of it."

The plaintiff could, in my opinion, have claimed the $200 as well, but he sued only for $204, and was content to let it go at that. No application was made to us on his behalf for amendment of his claim; and, in all the circumstances, I do not think the case is one in which the Court should exercise the powers given it by Rule 507.

The appeal should be dismissed with costs.

BECK, J.:—There was a joint stock company called "The Alberta Herald Publishing Company Limited," incorporated under the provincial Companies Ordinance. The authorised capital was $10,000, of which shares to the amount of $6,000 had been subscribed for. All the subscribed shares were paid-up in full. The plaintiff was the beneficial owner of the whole of the shares so subscribed and paid-up. The plaintiff agreed to sell to the defendants five-sixths of the shares so subscribed for and paid-up (i.e., paid-up shares to the amount of $5,000), for the sum of $10,000, payable $5,000 in cash, and the balance in three equal annual instalments.

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Out of the cash payment of $5,000, the plaintiff was to pay all the liabilities of the company. The words of the agreement are: "He (Koerman) . . . shall pay all the liabilities of the Alberta Herald Publishing Company Limited . . . from and out of the said first payment of $5,000 paid to him."

Some time prior to this agreement, the company had obtained an order from the provincial Government for the printing of certain Ordinances in the German language. The contract-price was $404. Prior to the agreement for sale in question, the company had procured the payment of the whole contract-price before doing any of the work, and none of it had been done prior to the agreement. After the agreement, the company caused the work to be done, for the company, by some one not in the employ of the company, at a cost of $200, and delivered the matter to the Government in fulfilment of the company's contract. The defendants paid the plaintiff the whole of the purchase-price of the shares either directly or by way of satisfaction of liabilities of the company, with the exception of $404, representing the amount paid by the Government to the company prior to the sale, which the defendants claimed was a liability the whole of which, under the terms of the agreement, the plaintiff was bound to pay. The plaintiff, on the other hand, contended that he was bound to pay only so much of the $404 (namely, $200) as the defendants expended in order to fulfill the Government contract; and, having this view, sued in this action for $204, the difference between the two sums.

His Honour Judge Lees, before whom the action was tried, gave judgment for the plaintiff with costs.

The defendants appeal. The books of account of the company were not produced, but there can be no doubt that, if the books were properly kept, there ought to be a ledger account shewing an account with the provincial Government, and that that account, so far as this question is concerned, ought to shew a credit of $404, with no debit against it, at the date of the agreement, and that any accountant or auditor, in making a financial statement of the company's affairs at that date, ought to have placed the item of $404 as a liability of the company.

Again, there can be no doubt that, if the company failed to do the work, the Government would have been entitled to recover from the company the whole contract-price, and not

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merely what, if it should so happen, it could be procured for from some other printing concern. There would be a total failure of consideration, and the company could not be permitted to say to the Government, "You in fact subsequently got the work done for less, the damage you actually suffered by reason of my breach of contract was merely the sum you subsequently paid," and thus make a profit from its own default. See Halsbury's Laws of England, vol. 7, tit. "Contract," p. 482; Azemar v. Casella, L. R. 2 C. P. at p. 678. In this view, it seems clear enough that the $404 represented a liability of the company to the Government.

But was it a liability which under the agreement he was bound to pay or indeed could pay? Ordinarily under a covenant to pay liabilities, there would be nothing to prevent the covenantor from going to the creditor and compromising the claim, or, I should suppose, where the liability was originally a liability on the part of the covenantor to do work, from doing the work himself or procuring it to be done, and thus satisfying the liability at less cost than the nominal amount of the liability. In the present case, however, it seems to me that the circumstances and the terms of the agreement are such as to amount to an implied agreement in the interest both of Koerman—who was retained as an employee, and who, though the covenantor, was not personally liable to do the work—and the company, that the company should fulfill all the outstanding contracts of the company, such as continuing to supply the newspaper to subscribers who had paid in advance, and completing advertising contracts and orders for job work. But, if this is so, and it seems fairly clear to me that it is so, was the liability of the company, although it must be admitted to have been a liability, one which was of such a character as can be taken to be one which it was contemplated that Koerman should "pay." It seems to me clearly not so, but, on the other hand, an obligation which it was contemplated the company should fulfill, or, if you wish, a liability which it was contemplated the company should discharge. Circumstances undoubtedly might have altered the position. If, at the date of the agreement, the Government had already rescinded the contract, on the ground of unreasonable delay in completion, as it legally might, had such delay occurred, and thus turned the liability to do work into a liability to pay money, that is, to refund the contract-price, on the ground of failure of consideration, then the liability would have been such

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a liability as the plaintiff would have been bound to pay; but these were not the facts, as is evident from the company subsequently doing the work and the Government accepting it.

I have already quoted the precise words of the agreement, and it is not to be forgotten that the covenant is one to pay, not to indemnify.

The result of my consideration of the matter is, that the agreement does not justify the defendants in charging either the whole or any part of the $404 to the plaintiff, and, in consequence of his refusing to pay, in deducting it by way of set-off as they did from the balance of his purchase-money. I think it was casus omissus from the agreement; that, probably, the question of continuing subscribers or advertisers' contracts, and almost certainly the liability in question, were not explicitly dealt with by the parties in their negotiations, and that the words of the contract do not cover them. Under these circumstances, that the parties on each side of the contract should pay one-half of the liability seems not an inequitable adjustment. The plaintiff has brought this adjustment about by suing, upon a mistaken view of his strict legal rights, for only $204, being the excess of the $404 over the actual cost to the company of having the work done.

For the reasons I have given, I think the plaintiff is entitled to the judgment he obtained; and, as it is for all he asked, and it is, as I think, all he is equitably entitled to, that the amount of the judgment should not be increased.

I would, therefore, dismiss the appeal with costs.

SIMMONS, J.:—The plaintiff was the owner of the Alberta Herald Publishing Company Limited, capitalised at $6,000, fully paid-up in shares, and sold to the defendants $5,000 of this stock or shares, for the sum of $10,000. In the agreement incorporating the terms and conditions of this sale, and as part of the consideration therefor, the plaintiff agreed as follows: "That he, the party of the first part, shall pay all the liabilities of the Alberta Herald Publishing Company Limited, which liabilities the said party of the first part hereby guarantees do not exceed the sum of $5,000, and will be fully paid and satisfied by him from and out of the said payment of $5,000 paid to him, the party of the first part: and shall and will forthwith satisfy the parties of the second part that all such liabilities are fully paid and satisfied."

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The Alberta Herald Publishing Company Limited, prior to the sale, had obtained a printing contract from the Government of the Province of Alberta, and had been advanced the contract-price of $404 by the Alberta Government for the same, but had not performed any part of the contract agreed by them to be done.

The company, subsequent to the purchase by the defendants of the shares aforesaid, carried out the company's obligation with the Alberta Government by sub-contracting the work at the price of $200. The defendants, in adjusting the first payment of $5,000, due to the plaintiff on the purchase-price of shares in the company, deducted the whole sum of $404, claiming it as a liability within the meaning of the clause in the contract of sale above set out. The plaintiff admitted the liability to the extent of the $200 paid by the defendants for having the work performed, and sued the defendant for the sum of $204, being the balance, and obtained judgment for the same and costs, and against this judgment the defendant now appeals.

The plaintiff, in his statement of claim, specificially sues upon his claim arising out of the contract of sale above referred to.

The defendants in their factum say that one of the liabilities of the company at that time was $404, being an advance to the company from the Alberta Government on account of a printing contract, no part of which contract had been then performed.

It would appear that, notwithstanding the fact that no reference is made in the agreement from which one can infer that the word "liability" is used in any other than its ordinary signification, namely, an obligation to pay or satisfy in money or money's worth, yet the plaintiff and defendants agree that the obligation of the company to perform this particular contract was a liability, within the meaning to be properly applied to that word in the clause of the contract above quoted. The plaintiff and defendants differ as to the amount required to satisfy this liability. The plaintiff alleges that $200 was the sum paid by the defendants to satisfy it, "and that is all the compensation they are entitled to from me in respect thereof." The defendants, while alleging that the $404 was paid as an advance on a printing contract, also take the ground that it was a loan by the Government, and no consideration was given therefor, and practically allege that, if the printing had not been per-

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formed by the company, the Government would be entitled to the return of the full amount of $404, on the ground of failure of consideration. I think it is quite untenable for the defendants to assume these two positions. We have no direct information of the terms of the arrangement between the Government and the company under which the advance was made, other than what is set out, except that it is called a contract by the plaintiff under cross-examination at the trial, and counsel for both parties refer to it as a contract for printing.

Assuming, then, that it was a contract which all parties to it looked upon as an existing one, and that the obligation to perform this contract was a liability which the company must perform, and for which compensation must be made by the plaintiff to the defendants for the performance or failure of performance thereof by the company, what is the proper amount of compensation? Is it $200, the amount actually expended by the company to fulfill the obligation, or is it $404, the amount advanced by the Government for the performance thereof? The defendants apparently infer that, if the company failed to fulfill the contract, the Government would be entitled to the return of the $404, upon the ground of failure of consideration. But, if they set up a failure of consideration, then there was never at any time an enforceable contract. Once the defendants have admitted that there was a contract between the Government and the company, then the action for non-performance would not be founded upon failure of consideration, but upon non-performance and its consequent result in compensation in damages for non-performance. It is quite clear, under this rule, that the measure of compensation in damages would be the amount the Government would have to pay to have the contract performed, and it is quite manifest that this sum would be only $200, as the company was able to go to the trade and have it done for this sum.

It is a well-established principle of law that the amount of consideration is not the measure of damages for breach of contract.

"If," said Parke, B., "the consideration is to be paid in money, it must be paid: if by delivery of a thing of ascertained value, that is the measure of damages:" Strutt v. Farlar, 16 M. & W. 249.

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Where a waggon was transferred in consideration that the defendant should break up certain land, the value of the labour and not of the waggon was held to be the measure of damages: Sedgewick on Damages, vol. 2, p. 256.

So, too, if the rent of mills is to be paid in repairs, the measure of damages is the value of repairs.

The defendants are clearly, then, entitled only to the sum of $200, which would have been the actual liability if the company had not, of its own accord, elected to do the work and discharge the liability.

The appeal should, therefore, be dismissed with costs.

HARVEY, C.J.:—With considerable hesitation, I agree that the appeal should be dismissed.

It does not appear to me that it is open to the plaintiff to contend that this is not a liability which he is bound to discharge, in view of the nature of the action, which is simply for the balance of $204. I also can see no good reason why the plaintiff should receive the sum of $204, which in the evidence appears to be the profit on a contract which the company took, which profit certainly ought to belong to the company. On the other hand, the extent of his liability, under his contract with the defendants, is to discharge the company's liability. As far as the evidence goes, the company's liability was discharged by the payment of $200; and the additional sum of $204 paid by the defendants to the company would appear to be a sum which the company was not entitled to receive, and which, therefore, the plaintiff should not be charged with. The circumstances suggest that the service for which the $200 was paid was not all that the Government contract called for. but the evidence does not shew this to be the fact.

*Appeal dismissed with costs.*

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## ALBERTA.

FEBRUARY 3RD, 1912.

SUPREME COURT EN BANC.

## KNIGHT v. CUSHING.

*Vendor and Purchaser—Contract for Sale of Land—Concluded Agreement—Terms — Formal Memorandum — Delivery in Escrow — Sufficiency to Satisfy Statute of Frauds—Down Payment—Refusal to Make before Title Cleared — Incumbrance — Difficulty as to Removal—Attempt by Vendors to Cancel Contract—Specific Performance—Equitable Terms—Indemnity against Mortgage—Payment into Court.*

An estate agent arranged, on behalf of the defendants, the owners of two lots of land, a sale of one of them to the plaintiff for $33,750. There was a mortgage upon the two lots for $15,000. The plaintiff knew of the existence of the mortgage and the amount thereof, but he supposed, as was not the fact, that the lot sold to him could be discharged from the mortgage at any time. The plaintiff paid the agent $100, and the terms of the bargain were in a memorandum in writing signed by one of the defendants in which he acknowledged the receipt from the agent of "$100, being deposit on" (describing the land); "price to be $33,750; terms, $10,000 cash, $10,750 in one year, $8,000 in two years, and $5,000 in four years from date hereof, with interest at 7% per annum, with privilege of paying the whole amount off at any time." A formal agreement, embodying exactly the same terms, was drawn up and signed by the plaintiff and defendants; by it the receipt of the down payment of $10,000 was acknowledged; but the payment was not in fact made, because the plaintiff wished to have the title examined before making the payment. The plaintiff's solicitor, upon searching the title, discovered that the mortgage-deed contained no provision permitting the payment of the mortgage-money before maturity; and, therefore, that the defendants' agreement to accept payment of the purchase-price in full at any time before maturity could not be fulfilled; and the plaintiff declined to make the down payment without some protection. The defendants gave the plaintiff notice that the contract was off, on account of the non-payment of the $10,000. The plaintiff brought this action for specific performance:—

*Held* (HARVEY, C.J., dissenting), that the payment of the $10,000 was not a condition precedent to the agreement becoming effective, and that the plaintiff was entitled to specific performance, upon equitable terms.

Specification of terms as to payment of part of purchase-money into Court and other terms.

*Per* BECK, J.:—The formal agreement was sufficient evidence of the contract to meet the defence of the Statute of Frauds. It was not handed over in escrow, nor upon condition that it should not be binding until the $10,000 payment was made nor upon other condition. Even if it had been delivered in escrow, inasmuch as the writing evidenced the complete agreement, it satisfied the statute. A purchaser of incumbered property is entitled to indemnity, by some means

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**reasonable and equitable in the circumstances, against the liability to be called upon to pay more than the agreed purchase-price in order to obtain a clear title.**

***Per* STUART, J.:—An agreement was arrived at between the parties with regard to the sale of the property and the terms upon which it was to be sold. The formal agreement, even if handed over in escrow, was a sufficient memorandum to satisfy the Statute of Frauds. The defendants were not justified in cancelling the contract and resisting specific performance.**

Appeal by the plaintiff from the judgment of SIMMONS, J., dismissing the action, which was brought by a purchaser against vendors for specific performance of a contract for the sale and purchase of land.

The appeal was heard by HARVEY, C.J., SCOTT, STUART, and BECK, JJ.

C. C. McCaul, K.C., and W. B. S. Craig, for the plaintiff.

W. L. Walsh, K.C., and A. F. Ewing, for the defendants.

BECK, J.:—The property in question is in Edmonton. It consists of parts of two lots—a corner lot and the adjoining lot. They front on Elizabeth street, with a frontage of 50 feet each and a depth of 150 feet each. The parcel, composed of the two lots, was bisected so as to make two lots fronting on First street, with a frontage of 75 feet each and a depth consequently of 100 feet each. It is the northerly of these two latter lots which is the subject-matter of the action.

Rolfe & Kenwood, a firm of real estate brokers, had the property listed for sale on behalf of the defendants, the owners. This firm arranged a sale of the property to the plaintiff for $33.750. The terms of payment appear further on.

There was a mortgage upon the two lots for $15,000. This action was occasioned by a dispute which arose respecting this mortgage. Kenwood, the member of the firm who conducted the business, knew of this mortgage, and that it had some four years to run. He did not know whether, by its terms, it could be paid off before its maturity, but he says that one of the defendants, from whom he received his authority and his instructions, guaranteed that the property in question would be discharged from it, when necessary. The plaintiff in his evidence says: "The first time he (Kenwood) was (i.e., came) to see me, he told me there was a $15,000 mortgage against the property;

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and, when he came to see me with the final instructions, he told me that the first cash payment would be $10,000, and that the second payment would be . . . $10,750, and the third payment was $8,000, and the balance, $5,000, was for the mortgage that would be against my portion of the property." The learned trial Judge was, therefore, quite correct in saying that the plaintiff, when buying, "knew of the existence of the mortgage and amount thereof," but he was incorrect in saying that he knew of the terms of payment; for, though he may have known of the periods at which payment of instalments might be called for, he was not aware that payment of these instalments could not be anticipated—the contrary of which he was led to believe was the case, by reason of the term of the agreement, presently referred to, that he could pay the whole balance of his purchase-price at any time. It was with this information regarding the mortgage that Kenwood, acting for the defendants, the owners, and the plaintiff, came to terms which were first expressed in a receipt signed by one of the defendants as follows: "Received from Rolfe & Kenwood the sum of one hundred dollars ($100) being deposit on the north half of lots 61 & 60, river lot 5 of the city of Edmonton. Price to be $33.750. Terms: $10,000 cash; $10,750 in one year; $8,000 in two years; and $5,000 in four years from date hereof; with interest at 7% per annum. With privilege of paying the whole amount off at any time. A. T. Cushing."

This represents the real and complete agreement between Kenwood, on behalf of the defendants, and the plaintiff. All question of Kenwood's authority disappears, inasmuch as the memorandum is signed by one of the defendants in person. The receipt bears no date, but was in fact signed a day or two before the 12th September, 1910.

It was undoubtedly contemplated between Kenwood and the plaintiff that, as a matter of course, a formal agreement should be drawn up and executed, both by the plaintiff, as purchaser, and the two defendants, as owners and vendors. There is nothing, however, to indicate that the execution of the formal agreement was a condition precedent to the agreement being binding. It seems to me that it is not important to inquire whether this receipt constituted a sufficient memorandum to satisfy the Statute of Frauds, inasmuch as a formal agreement was in fact drawn up, em-

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bodying exactly the same terms, together with some other usual provisions. This formal agreement, dated the 12th September, was executed by the defendants, and then handed by Kenwood to the plaintiff, who executed it in his presence. The agreement was in duplicate. It acknowledged the receipt of the down payment of $10,000. This was not paid, because, although the plaintiff was quite satisfied with the form of the agreement, and consequently actually executed it, he wished his solicitor, Mr. Wallbridge, to examine the title, and from that point of view approve of his making the down payment. The evidence is quite clear in my mind that the plaintiff had no objection whatever to the terms of the formal agreement, but wanted advice solely on the state of the title, including the question of arrears of taxes. The plaintiff says this distinctly. His letter written immediately to his solicitor, enclosing a cheque for the down payment of $10,000, is to this effect. Kenwood's evidence on this point appears to me to be not inconsistent but quite consistent with that of the plaintiff. Both copies of the agreement were, consequently, with Kenwood's approval, handed to Mr. Wallbridge.

I think this formal agreement is sufficient evidence of the contract to meet the defence of the Statute of Frauds. I do not think it was handed over in escrow. It was handed over to the plaintiff as a party to the agreement, and so prima facie at all events not in escrow: 16 Cyc. 571. It was handed over on no condition that it should not be binding until the $10,000 down payment should be paid or on other condition. Kenwood was undoubtedly quite satisfied that the plaintiff would pay the $10,000 if he found the title satisfactory. Even if it had been delivered in escrow, I think that, inasmuch as the writing evidenced the complete agreement, it satisfied the Statute of Frauds. I refer to Gillatley v. White, 18 Gr. 1, notwithstanding the comments made upon that case in McLaughlin v. Mayhew, 6 O. L. R. 174, and Vandervoort v. Hall, 18 Man. L. R. 682.

It is true that the formal agreement acknowledges the receipt of the $10,000, but the plaintiff admits that it was not paid.

A memorandum, otherwise sufficient under the statute, is not vitiated by reason of the insertion of a term disadvantageous or the omission of a term advantageous to the defendant, if the plaintiff admits the improper insertion, and submits to forgo it, or the improper omission and

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submits to be bound by the omitted term: Gillatley v. White, supra; Martin v. Pycroft, 2 DeG. M. & G. 785.

Mr. Wallbridge, upon searching the title for the plaintiff, discovered that the mortgage contained no provision permitting its being paid off before its maturity; and, therefore, that the defendants' agreement to accept payment of the purchase-price in full at any time before maturity could not be fulfilled. He insisted, on the plaintiff's behalf, on being protected in some way. Until this should be done, he declined to make the down payment.

The dispute between the parties continued for some length of time. Then the plaintiff brought this action.

The defendants contend that the contract is off, by reason of their notice to that effect, on account of the non-payment of the $10,000. The plaintiff contended and still contends that he is entitled to be indemnified in some way against liability for the $15,000, mortgage, and also that the defendants are bound to make a bona fide effort to effect an arrangement with the mortgagees which will enable the defendants to give effect, if called upon, to the privilege to the plaintiff of prepayment. The mortgage, being one which could not be immediately paid off and discharged, constituted a defect in title, and not merely a cloud upon the title which would come within what is called matters of conveyance.

The plaintiff had the right, therefore, to repudiate the contract. See Nimmons v. Stewart, 1 Alta. L. R. 384.

He had, however, in my opinion, alternatively the right to take the title, not necessarily in the condition in which he actually found it, that is, a title under which he could not take advantage of the privilege, which the agreement purported to give him, of paying up the whole purchase-price at any time, but in the best condition the defendants could reasonably procure it to be put: Wilson v. Williams, 3 Jur. N. S. 810; Dart, 7th ed., pp. 1079-1081. The absence of this right of prepayment was made specially important to the plaintiff by the circumstance, of which he was aware, that the mortgage covered other property, and that as between him and the defendants only was the amount severed.

Then, as to the plaintiff's rights upon adopting this course, I am strongly of opinion that the practice and procedure should be followed in this jurisdiction which was established many years ago in the province of Ontario, whence this province and the former Territories have

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drawn much of our legislation and jurisprudence, and whose usage in adopting agreements for sale in which the purchase-price is payable by instalments prevails so widely here. That practice is indicated by the cases of Gamble v. Gummerson, 9 Gr. 199; Cameron v. Carter, 9 O. R. 431; Armstrong v. Auger, 21 O. R. 100; and these cases have already been followed and applied in cases in this Court, some of which are not reported. See Mason v. Greaves, 2 Alta. L. R. 179.

These cases shew that a purchaser of incumbered property is entitled to indemnity, by some means reasonable and equitable under the circumstances, against the liability to be called upon to pay more than the agreed purchase-price in order to obtain a clear title. In considering what, in the circumstances of any particular case, would be a reasonable and equitable adjustment, it seems to me that no consideration should be given to the financial worth of the vendor—that regard should be had only to the property itself and the incumbrance against it. Here the total purchase-price is $33,750; the incumbrance on this and the adjacent property together is $15,000.

Though I think the wise course for Mr. Wallbridge, acting for the plaintiff, and a quite safe one under the circumstances, was to have made the down payment of $10,000, leaving the question of indemnity until the first deferred instalment fell due, I am of opinion that the payment of the $10,000 was not a condition precedent to the agreement becoming effective, and that the plaintiff had the strict right to insist upon the best adjustment of the title reasonably procurable before making even that payment; and that, taking this view, Mr. Wallbridge's suggestions as to the means of doing this were reasonable; and it is quite clear that there was not the slightest intention on the plaintiff's part to abandon the agreement; and, the delay which has taken place having arisen out of a bona fide dispute as to title, for which the defendants are in a large measure responsible, it is not sufficient to deprive the plaintiff of his right to specific performance, to which I now think him entitled upon such terms as the Court, in view of the authorities I have cited, thinks just and equitable under the circumstances.

I think the plaintiff will have reasonable protection if an order be made as follows: Direct the plaintiff to pay to



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the defendants forthwith the $10,000 without interest. Direct the plaintiff to pay into Court the first deferred payment with interest as called for by the agreement. Reserve leave to the defendants to move in this action before a Judge in Chambers for an order for payment out; the other deferred payments to be paid into Court as they mature, with like leave reserved, unless a Judge shall otherwise order. The defendants will have in the meantime an opportunity of making an arrangement with the mortgagees, and of asking the plaintiff to become a party to any reasonable arrangement with them, for the severance of the mortgage and the right of prepayment of the part thrown upon the land in question, all matters which would affect the disposition of the plaintiff's application; and I think that, on any such application, the Judge should, if the question arises, charge the plaintiff with a share of any bonus the defendants may pay, as suggested by my brother Stuart.

I agree that the costs of the action and of the appeal should go to the plaintiff.

SCOTT, J.:—I am of opinion that this appeal should be allowed with costs.

In my view, the provision in the agreement of the 12th September, 1910, that the down payment of $10,000 should be paid on the signing thereof, should not be construed as a stipulation that the agreement should not be effective between the parties until the payment was made, or as anything more than that there should be a down payment to that amount. I cannot conceive that it was the defendants' intention that the plaintiff should pay the money irrespective of whether they had any title to the property or the right to convey, and I cannot read that intention into the agreement.

Assuming that the agreement providing that part only of the price should be paid on the signing of it, had provided that the whole price should be paid at that time, I think it would be unreasonable to hold that the plaintiff would have been bound to pay the price without inquiry as to the title or as to the defendants' right to convey; and, I cannot see that that position is altered by the fact that only part of he price is required to be paid down.

In England, a vendor generally reserves the right to rescind the contract if the purchaser insists upon any re-

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quisition or objection which he shall be unable or unwilling to remove or comply with (see Williams on Vendor and Purchaser, 2nd ed., p. 64). There is no such express reservation in the agreement now under consideration; but, if the construction sought to be placed by the defendants upon it should be upheld, it would be much more favourable to the vendors than the expression of such a reservation.

The plaintiff appears to have been ready and willing to pay the down payment; but he ascertained that, owing to a mortgage upon the property, the defendants were not in a position to perform the agreement in the manner in which he was entitled to have it performed, unless they obtained the concurrence of the mortgagees. The agreement provides for the payment of the price by instalments, subject to the right of the plaintiff to pay the whole price at any time; but, even if he did not avail himself of that right, the last instalment of the price becomes due before the maturity of the mortgage.

The plaintiff's objection to the mortgage was, that it included other property than that agreed to be conveyed; and that fact in itself would prevent him selling the property purchased. I see nothing unreasonable in his seeking before making the down payment to have that obstacle removed or arranged in such manner as would enable him to deal freely with the property in the manner he was entitled to.

One of the defendants admits that he told his selling agent to explain to the purchaser that he proposed to divide the payments, that is, the responsibility in connection with the mortgage, between the two parts of the property, applying a named proportion to the property in question; and the agent communicated this to the plaintiff during the negotiations for the purchase.

If the defendants were willing to make this arrangement, I see no reason why they should not be called upon to obtain the assent of the mortgagees before calling for the down payment. In fact, one of the defendants expressed to the plaintiff's solicitor their willingness to do so, and asked the solicitor to draft for him a letter to the mortgagees asking their concurrence in the arrangement. Upon receipt of the draft, however, he refused to make the application: and, influenced apparently by the increase in the value of the property after the date of the agreement, he notified the plaintiff that the deal would be cancelled unless the down payment were made at once.

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In Williams on Vendor and Purchaser, 2nd. ed., p. 165, the following is stated: "And, if the land sold be subject to mortgages, the vendor has none the less shewn a good title on the abstract, provided that the mortgages be immediately redeemable by him. . . . Here we notice that the general rule of equity that a mortgagee must give six months' notice of his intention to pay off the mortgage is no bar to the immediate exercise of the right of redemption, for the mortgagor is entitled to pay the mortgagee six months' interest in advance in lieu of notice . . . but it is, of course, a different thing if the land sold be subject to a mortgage, which is not to be called in or paid off during a certain term. In such case the discharge of the incumbrance is not a matter resting with the mortgagor alone; as the mortgagee cannot be obligated to receive back his money during the term."

Again, at p. 1179: "If the interest of the other person is such that the vendor is entitled, either absolutely or upon the terms of paying him off, to direct him to concur in the conveyance to the purchaser, the purchaser should require the vendor to obtain such concurrence. If the vendor should have no such right to direct the other person to convey, the purchaser would be entitled to object to the title; but, he might, instead of repudiating the contract, require the vendor to procure the other person's concurrence in the sale."

The amount secured by the mortgage on the property in question was less than the whole purchase-money which the plaintiff was to pay, and it may be said that, without its removal, he would be amply secure in making the down payment while it was outstanding; but I see no reason why a different principle should apply in such case to that which would be applicable where the incumbrance exceeds the amount of the purchase-money, viz., that the purchaser is entitled to object that the incumbrance will prevent his dealing with the property in the manner in which he is entitled to deal with it.

STUART, J.:—There are three distinct questions to be considered in this case. First, was there ever an agreement arrived at between the parties with regard to the sale of the property and the terms upon which it was to be sold? Second, was that agreement, if one existed, evidenced by a memorandum sufficient to satisfy the Statute of Frauds? Third, assuming these two questions to be answered in the affirma-

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tive, were the defendants justified, in the circumstances, in cancelling the contract and resisting specific performance?

It is obviously convenient to deal with these questions in the order mentioned.

Upon the first question, it appears to me that it will in this case be particularly helpful to bear in mind that an agreement as to the purchase and sale of the property in question and as to the terms of such purchase and sale may well have been and very probably was arrived at before any document was signed at all. It does not very clearly appear from the evidence whether Rolfe and Kenwood were authorised to sell, i.e., to make a bargain binding on the defendants, or merely to find a purchaser. The defendant A. T. Cushing says in his examination for discovery that he "instructed them to sell the north half of the lots and instructed them in regard to the price." If it could be inferred from the evidence that Rolfe and Kenwood had been given the wider authority, then it would have been quite possible that a real agreement was reached simply by the oral communications which passed between that firm and the plaintiff. I do not think it necessary, however, to inquire very minutely into this point, because, even assuming that Rolfe and Kenwood were merely empowered, in the first instance, to find a purchaser willing to make an agreement of purchase on certain stated terms, it is still quite possible that a real agreement may have been arrived at (and I am speaking now quite aside from any question of the necessary evidence of such an agreement prescribed by the Statute of Frauds), even though Cushing and Knight never personally met at all. Messrs. Rolfe and Kenwood, although not empowered by either party to buy or sell, may well have been empowered by both to convey oral communications by which an agreement could be arrived at between them. Rolfe and Kenwood were, no doubt, told by Cushing, "See if you can get us a purchaser on these terms"—setting them forth. They then, no doubt, said to Knight, "Will you buy this property from Cushing on these terms?"—setting them forth. Knight, no doubt, said, "Yes, I will, and tell him I will take it on those terms, and give him a deposit for me." Rolfe and Kenwood, no doubt, then saw Cushing and said, "Knight offers to buy on your terms, will you sell to him?" And Cushing possibly said to Rolfe and Kenwood, "Yes, I will sell, and you may tell him so." Then, if Rolfe and Kenwood conveyed this message to Knight, it seems to me clear that an agreement

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was arrived at. Aside from the requirements of the statute, it can make no difference how that consenus ad idem, that meeting of minds, was brought about. The medium of communication may be a letter or it may be an oral message conveyed by a messenger.

Now, the evidence taken at the trial does not seem to have been directed very particularly towards proving the occurrence of any such verbal communications as I have referred to—no doubt, because it was considered that the documentary evidence was sufficient, as well as necessary, under the statute, in any case. But, taking the evidence as to oral communications, as far as it goes, along with the documentary evidence, I am of opinion that the inference can and should be drawn that an agreement had in fact been arrived at as to the property sold, the price, the terms of payment. and the parties selling and buying. Knight tells of his interview with Kenwood when he instructed him to pay Cushing a deposit of $100 on the property; and it is, in my opinion, abundantly clear that Knight then told Kenwood, Cushing's agent, that he would buy the property upon the terms mentioned; that Kenwood communicated this fact to Cushing at the time of the signing of the memorandum of the 12th September; and that Cushing then assented to the sale to Knight, upon the terms mentioned in that memorandum. It is true that Knight's name is not mentioned in the memorandum as being the purchaser, and that, for that reason, the memorandum is not sufficient (unless it could be held that Rolfe and Kenwood were in some sense his agents as well, which is doubtful) to satisfy the statute. But that is another question. Cushing knew that Knight was the proposed purchaser a few days before the memorandum was signed, as he so states himself. It does not appear from the evidence whether Kenwood ever in fact returned to Knight and conveyed to him the fact that Cushing had agreed to sell to him, on the terms mentioned, at any time prior to the delivery of the signed agreements. Such a communication was, no doubt, necessary before there could be a concluded agreement. It is possible that the fact that Knight instructed Kenwood to pay $100 as a deposit on his behalf might be sufficient to justify the inference that Knight had constituted Kenwood his agent to receive Cushing's reply, and that, upon Kenwood's so receiving it, the consensus ad idem had been completed. In that case the situation would be that the parties had agreed upon a bargain, but that the intention

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was that this bargain should be evidenced by a proper written document, and that the cash payment of $10,000 should be made, not forthwith at the conclusion of the agreement, but at a time shortly deferred, namely, when the written document should have been prepared and executed. But it is not necessary, I think, to rest anything upon this, because it is clear that the fact that Cushing had agreed to the sale upon the terms arranged was communicated to Knight when the duplicate agreement was delivered to Knight by Kenwood.

But it is contended that the payment by Knight of the sum of $10,000 in cash upon the execution of the agreement was a conditions precedent; that Cushing's assent to the terms was conditional upon this payment being made; and, that, inasmuch as it never was made, there was never really any agreement arrived at at all. Let us examine this contention and see what it means. Take the case where there is a sale for cash, where the whole purchase-price is going to be paid at once. Two parties agree upon a purchase and sale for $10,000 cash. They go to a solicitor to draw the transfer. He does so. The transfer discloses all the terms and expresses the receipt of the $10,000. The vendor signs it and turns to the purchaser and says: "Here is your transfer. Give me you $10,000." The purchaser says, "But I must look at the title first." Can the vendor say: "No, this sale was for cash on the execution of the transfer; and, if you don't pay forthwith, the deal is off?" It it obvious that he cannot. He has made his bargain. It is evidenced in writing, signed by him. He must give the purchaser an opportunity to examine title. Then go a step farther. Supposing that in this case Knight and Cushing had met personally and had arranged the terms of their bargain, as they were in fact arranged through Kenwood; and suppose they had gone to Mr. Wallbridge, as a solicitor, to have the agreement drawn. Suppose the exact agreement had been drawn by Mr. Wallbridge that was in fact drawn; and suppose they had both executed that agreement at the desk of Mr. Wallbridge. (For the purpose of illustration I leave the second Cushing out of the case). Then, when Cushing had signed and Knight had signed, when the bargain had been made, and its terms evidenced by a valid memorandum, suppose Cushing had said, "Now, Mr. Knight, give me your $10,000 cheque." Suppose Mr. Knight had replied: "I will in a moment, in a few minutes, in half an hour, but I want Mr. Wallbridge to see that you have title

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first. Ten thousand dollars is a large sum. Before I pay that over, I, of course, must inquire as to the position of your title." Could Cushing in such a case have said: "No, our agreement was that you pay $10,000 cash on the execution of this document. If you do not pay the $10,000 cash forthwith, then there is no agreement at all, there never was one?" And, if Knight had insisted on having Mr. Wallbridge look at the title first before payment, could it be said that, owing to the delay for this purpose only, there never was any agreement arrived at between the parties at all? I am of opinion that such a contention cannot be sustained. In the first place, there does not appear, either in the evidence as to the oral communications or in the written agreement itself, any stipulation that the payment of the $10,000 should be a condition precedent to the existence of an agreement. Assuming that the written document correctly records the agreement arrived at between the parties, then it is clear that what was agreed upon was not that the payment of the $10,000 should be a condition precedent to the existence of the agreement, so that, in the absence of such payment, there was no agreement at all, which really amounts to a contradiction in terms—but that the time for the payment of $10,000 out of the total purchase-money should be the time when the written document was executed. In the second place, inasmuch as the agreement merely fixed a definite time for the payment of the $10,000, viz., the moment of the execution of the document, I think that the purchaser had as much right to ask for time to look at the title as he would have in the case I first put, where the whole purchase-price is to be paid at once. When once an agreement is arrived at for the sale of real estate and is evidenced by a proper memorandum, a purchaser is never bound, in my opinion, to make the cash payment until he has a chance to look at the title. Otherwise purchasers negotiating for the acquisition of real estate would be forced to go to the expense of investigating the title before making an agreement at all, and so before they knew whether the proposed vendor was really going to agree to sell. I think it desirable that it should be clearly understood by dealers in real estate (and I desire to make my words as emphatic as possible) that, when an agreement is once made, even though there be but a small cash payment stipulated for, and the balance is payable by instalments, the purchaser has absolutely as much right to inquire into the title at the beginning, and

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before making any payment at all, as he would have if he were paying all cash down. He has a right to know that the vendor can make title, if not forthwith, at any rate when the time comes to do so.

It must be remembered that, until his solicitor had examined the title, Knight had no independent means of knowing whether Cushing had a title at all or not. It might well have been disclosed by a search at the land titles office that there were other incumbrances besides that already spoken of in the negotiations, or that Cushing had in fact a title defective in other ways—although, of course, Cushing was not likely to agree to sell property he did not own. But a purchaser must protect himself; and, once it is established that Knight had a right to withhold the $10,000 until the title could be examined, which it is surely abundantly clear that he had, then the contention that the payment of the $10,000 was a condition precedent to the existence of any agreement at all falls entirely to the ground.

It was contended by counsel for the respondent that, because the learned trial Judge had found "that the agreement in duplicate was given to Kenwood by the vendor on the understanding that it should only be delivered on the payment of $10,000 cash payment, and there was no delivery of this agreement to the purchaser other than for the purpose of examination and inspection," therefore the appellant cannot rely upon this agreement. I am of opinion, however, that this finding of fact does no harm to the appellant's case. Even if Cushing did not intend it to be delivered except on payment of the $10,000 cash, that does not prevent its delivery, in escrow if you will, from being evidence of a communication to Knight by Cushing that Cushing agreed to sell upon the terms mentioned in it, which were in fact the terms offered by Knight. The fact of Cushing's assent to the bargain would have been just as effectually communicated to Knight, if Kenwood had merely shewn the agreements to him, and had merely said, as he did in fact say, "Here are the agreements signed by Cushing Brothers." In my opinion, the minds of the parties met, and agreement was concluded, at least when this delivery was made, if not before, just as much as if Cushing had written a letter to Kenwood stating the same things as were contained in the agreement and Kenwood had taken and read such letter to the plaintiff.

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It is true that, in certain circumstances, an offer of sale may be made of which acceptance can only be indicated by payment or deposit of a sum of money, as in the case of Charlton v. Rediger, recently decided in this Court. But it is, in my view, impossible to look upon Cushing's signature of the agreements, their delivery to Kenwood, and the subsequent exhibition of them by Kenwood to Knight, as merely an offer by Cushing. It was the acceptance by Cushing of an offer previously made by Knight; and, for the reasons given, I do not think the acceptance was conditional upon payment of the $10,000. There was an unconditional acceptance which constituted an agreement, one term of which was that $10,000 was to be paid in cash. But that would not prevent the question of title being at once raised by Knight.

Moreover, we have the finding of the trial Judge that an agreement was in fact reached—a conclusion abundantly justified by the evidence.

The second question is, was there a sufficient memorandum in writing to satisfy the Statute of Frauds? I am of opinion that there was. I do not think it is necessary to consider the question whether or not the first receipt was sufficient, because it seems to me to be clear that the agreement itself constitutes a sufficient memorandum, even if it were never properly delivered. The memorandum required by the statute is not a deed of which delivery is essential to make it effective. The whole question is merely one of evidence; and, even if Cushing had never parted with the agreement at all, but had retained it in his possession, or his agent Kenwood had retained it, still its production in evidence at the trial would be sufficient to satisfy the statute, although, of course, the actual making of the agreement itself must then have been proved aliunde, in some such way as I have already suggested. See Gibson v. Holland, L. R. 1 C. P. 1; In re Hoyle, [1893] 1 Ch. at pp. 99, 100.

It was suggested, however, that, inasmuch as it was an essential term of the agreement that the title should be accepted subject to the mortgage, with the right to the plaintiff to insist upon its discharge if he should at any time exercise the right reserved to him of paying the purchase-money in full before its maturity, and inasmuch as the agreement contains no such term, therefore the memorandum is insufficient as not containing all the terms of the agreement.

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I am unable to give effect to this contention. The fact is, that the mortgage money fell due on the 1st November, 1914, while the last payment under the agreement of sale was payable on the 12th September, 1914. Under the terms of the mortgage, Cushing had no right to pay it off at any earlier time than the dates mentioned. It is clear from the evidence that, although Knight knew of the existence of the mortgage, he was not made aware of its exact terms nor of the fact that Cushing had no legal right to redeem it in advance of the date mentioned. It is true that the evidence of Kenwood shews that it was agreed by him on behalf of Cushing that Knight might pay all the purchase-money up at any time, and that Cushing would, on such payment being made, secure a discharge of the mortgage. But this is covered by the agreement, because Cushing stipulates therein that Knight may pay in full at any time, and that he will give a good title upon such payment being made. The evidence does not disclose any other agreement on Knight's part with regard to the mortgage. I can find nothing to justify any inference that Knight specifically agreed that he would pay the $10,000 without looking into the title at all, without any further examination of the mortgage, and without raising any further question in regard to it. It would be extremely unlikely that he would make any such agreement, when he had nothing more than Cushing and Kenwood's word as to the terms of the mortgage. There was no verbal agreement made in regard to the mortgage other than that embodied in the written agreement.

A doubt has, indeed, occurred to me as to the sufficiency of the memorandum upon a point which was not raised by the defendants at the hearing in appeal, nor apparently in the Court below. Kenwood's evidence disclosed the fact that Knight verbally agreed to pay one-third of any bonus that might be found necessary to be paid to the mortgagees in order to secure a discharge of the mortgage, and there is no reference to this in the agreement signed. It is clear, however, that this does not constitute an insurmountable obstacle to the plaintiff, and would not have done so, even if the defendant had actually raised the point, which he did not. The plaintiff has not refused to observe this undertaking. The point seems to be well covered by the decisions in Martin v. Pycroft, 2 DeG. M. & G. 785, and in Ramsbottom v. Gosden, 12 R. R. 207, 1 Ves. & B. 165. In the former case, Lord Justice Knight Bruce said: "Our opinion is,

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that, where persons sign a written agreement upon a subject which is obnoxious or not obnoxious to the statute that has been so particularly referred to, and there has been no circumvention, no fraud nor (in the sense in which the term "mistake" must be considered as used for this purpose) mistake, the written agreement binds at law and in equity according to its terms, although verbally a provision was agreed to which has not been inserted in the document; subject to this, that either of the parties sued in equity upon it may perhaps be entitled in general to ask the Court to be neutral unless the plaintiff will consent to the performance of the omitted term."

There has here not only been no allegation by the defendants of fraud or mistake upon the point in question, but, as I have said, the matter was never raised at all. The verbal agreement as to the bonus seems to me to have been merely a subsidiary arrangment as to the expenses of making title, such as occurred in Ramsbottom v. Gosden, above cited. The plaintiff may, under certain conditions to which I shall again refer, be bound to observe his verbal undertaking, even though not contained in the written agreement, but it cannot be used any further against him.

The memorandum is, in my opinion, therefore, sufficient to satisfy the Statute of Frauds.

The remaining question is, whether Cushing was justified, in the circumstances, in cancelling the contract and in resisting specific performance.

Upon this point the learned trial Judge held that Knight had no right to refuse to pay the $10,000 in the way he did, and that Cushing was justified in cancelling the contract. With great respect, I am unable to concur in this view. When Cushing agreed to give title free of incumbrance whenever Knight paid the purchase-price in full, it seems to me that Knight was justified in assuming that Cushing had the legal right under the mortgage to do this. Yet it turned out, when Mr. Wallbridge examined the title for Knight, that no such right existed. There is evidence that Cushing talked to Kenwood about a bonus being paid to the mortgagees, but the mortgage makes no mention of a bonus, and as yet there is nothing to shew that they would accept a bonus and give a discharge. Furthermore, there is no evidence that Knight was aware that the mortgage could not be paid off until some six weeks after the date of the last payment under the agreement of sale. Therefore, if Knight

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had waited and paid only according to the agreement, Cushing could not necessarily give a good title until that further period had elapsed, although it may be that, upon payment of interest in full, the mortgagee would be willing to discharge. But we as yet have no evidence that this can be arranged. This difficulty is also something discovered by Mr. Wallbridge of which Knight was not aware, and which might be of the greatest possible importance to him when the time came when he was entitled to his transfer.

In England, an agreement for the sale and purchase of real estate usually includes a clause giving the vendor a right to rescind, if the purchaser makes any requisition as to title with which the vendor is unable or unwilling to comply. Such a clause is not usual in our agreements of sale in Alberta, and is not contained in the agreement in question here. We are left, therefore, to the general rules as to the right of one party to a contract to cancel or rescind it. I am not aware that any peculiar rights are given to a vendor of real estate different from those enjoyed by any other contracting party. If one party to a contract either announces directly that he does not intend to do his part, or so conducts himself as to justify the other in believing that he has renounced it and does not intend to carry it out, then the other may accept the express or implied refusal, and may refuse to be bound any longer himself, thus cancelling the contract. It is for this reason that a purchaser of real estate under an agreement of sale, who fails to pay the purchase-price when due, and who fails after the agreed or reasonable notice to remedy his default, is taken in many cases to have renounced the contract so that the vendor is justified in cancelling it. So, also, if a purchaser insists, before consenting to pay, upon the vendor's doing something which under the contract he is not bound to do, i.e., where he insists upon adding, practically, a new term to the contract which was not agreed upon, and persists in this attitude, the vendor is, no doubt, justified in refusing to be bound any longer himself, and, therefore, in declaring the contract at an end.

In the present case, however, it is perfectly obvious that Knight always intended to carry out the contract. Nothing that he did could justify any one in believing that he did not intend to do his part as agreed. His solicitor actually handed a copy of the agreement signed by Knight back to Cushing. The whole point in the case seems to be, whether Knight was justified in withholding the cash pay-

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ment of $10,000 until his demands in regard to the mortgage were complied with. I think we must put aside any consideration of what the position would have been if the mortgage had been redeemable at the option of the vendor at any time, or if it had been finally repayable within the currency of the agreement of sale. This situation is what Knight was led to believe existed, or at any rate he knew nothing to the contrary. If it had been the real situation, and he had refused the payment of the $10,000, although knowing of the existence of the mortgage, I do not wish to be taken as expressing any opinion as to what his rights would have been. But I think that, when Knight's solicitor found what the facts were, he was clearly within his rights in asking that some arrangement be made about the mortgage.

In Thompson v. Brunskill, 7 Gr. 547, this matter is discussed by Vice-Chancellor Spragge. At the page given, he says: "It appears to me upon such a contract a purchaser is not bound to pay one shilling of the purchase-money or interest unless a good title is shewn; and that he stands upon the same footing in that respect as if the whole purchase-money were payable in hand."

Where the purchaser knows of the existence of a mortgage, and is correctly informed of its terms before making his agreement, and still enters into the agreement in the face of the mortgage, his rights may possibly be considerably modified; but, where he either knows nothing of the existence of a mortgage or has not been sufficiently informed of its terms, he has, I think, a right to assume that the vendor is able to give title according to the terms of the agreement into which he enters, at any rate where the information tendered shews nothing to the contrary.

I do not take Wallbridge's demand as meaning that Cushing must procure an immediate discharge of the mortgage. His demand went no further than that Cushing should procure from the mortgagees such an agreement as would enable him, Cushing, to give a good title free of incumbrance, whenever Knight choose to pay up in full. I am not sure that it should, indeed, be interpreted as going that far, but it certainly went no further, and that far Knight was certainly entitled to go. He was not, therefore, insisting on Cushing doing something which he was not bound to do, but was in reality simply asking Cushing to fulfill what is an implied term of every contract of sale of land.

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That being so, I think Cushing had no right to annul the contract, and that Knight is entitled to specific performance of it. It is said that, when Knight discovered the defect in the title, he was bound to say either one of two things, either that he repudiated the contract altogether, or that he accepted the title as it stood. I confess that I cannot understand this contention. Cushing was not then merely offering a contract to Knight. The contract had been made, and Cushing had assumed certain obligations under it. Certainly Knight had a right to ask for some assurances that those obligations could be fulfilled, not before making his contract, for it was already made, but before risking his money. I cannot see how he should be precluded from getting specific performance of a contract on which he always insisted, merely because he anticipated, not before making the contract, but before starting to carry it out, an objection which he could quite properly raise on a reference as to title.

The appeal should be allowed with costs, and the judgment below set aside and judgment should be entered for the plaintiff with costs.

The ordinary decree for specific performance should be made. The plaintiff should be directed to pay the $10,000 into Court. If and when the defendants are able to prove, to the satisfaction of a Judge, that they have an agreement with the mortgagees by which they bind themselves to discharge the mortgage upon reasonable notice, then I think the defendants should be at liberty to apply to a Judge for payment out of Court to them of so much of the purchase-money as a Judge may think may safely be paid, without prejudice to the purchaser, and upon such terms as the Judge may deem proper.

The second instalment of $10,750 being now overdue, the plaintiff should pay this into Court as well.

If the defendants shew that they are able to secure a discharge upon payment of a bonus, I think the plaintiff should be required to pay one-third of it, as he verbally agreed to do, provided the Judge is of opinion that the bonus demanded is a reasonable one. The amount of the bonus was never mentioned; and, that being so, I think the plaintiff can only be held to have agreed to pay what would be reasonable in the circumstances.

If the defendants cannot secure a discharge at all until the mortgage-money is formally payable, or only upon pay-

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ment of an unreasonable bonus, I think that the plaintiff would be at liberty either to withdraw from the agreement altogether and have an order cancelling it, or to take the best he can get, and wait till the mortgage matures. If, at any time before that, he pays the whole purchase-money into Court and has to wait for his title, I think he is also entitled to a judgment for damages for the delay, and to a reference to fix the amount of the same.

A further question as to interest will also arise. The plaintiff has, of course, not been in possession, and he has properly withheld payment of the $10,000 until title could be shewn. The delay has been due to the default of the vendor, and there should be no interest payable upon this sum. With respect to the second payment, which fell due on the 12th September, 1911, my view is, that the interest agreed upon should, subject to what I shall say as to possession, be paid up to that date. The purchaser was entitled to raise the question of title every time he was called upon to make a payment and to withhold a payment until title was shewn. The $10,750 was not withheld during the year because of defect in title, but because the agreement deferred the payment of it. The purchaser was entitled to immediate possession, however; and if he can shew that he has lost any rents and profits during the year, I think he should be relieved also of the interest upon that instalment during the period of such loss. See Dart, 7th ed., vol. 1, pp. 650, 651. The loss of interest for over a year on $10,000 and for four months or more on $10,750 may seem a serious hardship upon the defendants, but I shall have no regret over that, if the result of this case is to impress upon vendors who sell land on the instalment plan the fact that they cannot call upon a purchaser to pay money to them for their land unless they can shew that the purchaser is safe in regard to title, and will be able to get it beyond question when the time comes to demand it.

The above judgment was written without my having the advantage of consultation with the other members of the Court; and, although I still think that the details of the judgment should be as I have stated, I defer to the opinion of Scott and Beck, JJ., and assent to the judgment being entered as they have stated.

HARVEY, C.J. (dissenting):—I am prepared to assume, though without expressing any opinion on the point, that

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there was a concluded agreement between the parties, and that the particulars of it are set out in the formal document dated the 12th September, 1910, and signed by the parties. It becomes unnecessary, in this view, to consider any question of compliance with the Statute of Frauds.

The inference I draw from the evidence is exactly that which the learned trial Judge drew, viz., that the plaintiff knew all of the particulars of the mortgage, that are at all material. In the letter of one of the defendants to him of the 22nd September, which was put in evidence, is the statement: "At the time negotiations were entered into, you were informed as to the condition of the title." Kenwood, the defendants' agent, also says that he was instructed by his principals to inform the plaintiff and that he did inform him of the mortgage, the amount, the name of the mortgagees, and the due date, though later he says he did not know whether the plaintiff knew that the mortgage did not fall due till 1914. He says he also told him that, if he, the plaintiff, wished to pay up on the agreement at any time before its maturity, the defendants would endeavour to get the mortgage discharged, but that, if any bonus had to be paid for so doing, the plaintiff would have to pay his proportion. The plaintiff, who gave evidence on his own behalf, does not suggest that there was any fact about this mortgage that he was not aware of at the time he signed the agreement, and he specifically states that he knew that the mortgage covered the whole of the two lots, and that the final payment under the agreement of $5,000 "was for any mortgage that would be against my portion of the property." In view of his knowledge that the only mortgage there could be was the one then existing, this must mean that the $5,000 was the portion of the mortgage which, as between himself and the vendors, he was to assume.

The plaintiff, without communicating to his solicitor the extent of his knowledge, instructed him to search the title and pay over the $10,000, if the title were found satisfactory. Mr. Wallbridge, the solicitor, did not consider the title satisfactory, and consequently did not pay over the $10,000, but, instead, commenced negotiating with the defendants to have some satisfactory arrangement made, so that as between the mortgagees and the purchaser, a definite portion of the mortgage should be charged against the property being purchased. He states his objections as follows:—



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"A. I explained to him that the mortgage of $15,000 covered the whole of the property; that the portion he was selling to Mr. Knight was subject to the whole of that mortgage, the same as the other portion; that, if Mr. Knight wanted to sell that property, he would have difficulty in having a purchaser pass title, in view of the fact that there was a mortgage of $15,000 against his property and another property, which was so mixed up that he could not sever it without the consent of the mortgage company. I told him that I had no instructions to pass title of that kind. I suggested to him that, if he would agree to procure a discharge of that mortgage, or if he would agree to have the mortgage company enter into an arrangement by which they would make a severance of the amount of the mortgage so that a portion would be procured to the north part and a portion to the south part, I would pass title.

"Q. What proportion? A. I told him it was immaterial as long as it was definitely ascertained. Five thousand was the amount that was suggested in some manner or other, I am not exactly certain, but I told him it didn't matter whether it was five thousand or some other amount, as long as it was an ascertained amount; and if it was different from $5,000 we could make an amendment of the agreement to cover it.

"Q. You could make an arrangement accordingly? A. We could make an arrangment accordingly.

"Q. And what else? Did you make any further suggestion? A. I suggested that he communicate with the Independent Order of Foresters, the mortgagee, and try to fix up some such arrangement. I suggested that either at the first telephone conversation or at the verbal conversation in my office, I am not sure which. It was at the second conversation he called me up and asked me if I would write him a letter to the Independent Order of Foresters, draft a letter for him, covering the suggestions to them, that they would enter into such an arrangement.

These objections were eminently such as a wise man should consider before entering into an agreement, but the question is, whether, having entered into the agreement, they could be insisted on.

It may be noted that no objection whatever is made to the fact that the mortgage would not fall due until after the last payment under the agreement, and that they only relate to the fact that the mortgage covered more property

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than the plaintiff was purchasing, which fact was known to the purchaser at the time he signed the agreement, as he himself distinctly admits.

Mr. Cushing, while offering no objection to trying to satisfy Mr. Wallbridge, insisted on the $10,000 being paid in the meantime, which Mr. Wallbridge refused. Four days later, on the 22nd September, the draft letter having been prepared in the meantime, Mr. Cushing writes stating that, though it is no part of the agreement, he will do what he can to meet Mr. Wallbridge's views if the $10,000 is paid, but that, if it is not paid by the 26th inst., he will consider all arrangements cancelled. On the same day, he writes to the plaintiff, pointing out, as indicated above, that the plaintiff knew the state of the title when the negotiations were entered into, and that he will consider the deal cancelled if payment as provided in the agreement is not made by the 26th inst. The money was not paid, but on the 26th Mr. Wallbridge writes, stating that he has discussed the matter fully with the plaintiff, and says: "All that he requires is, that the title be put in some shape so that he will not be hampered in dealing with the property. He cannot accept it as it is at present, however, as he could hardly hope to find any purchaser to accept it from him." He goes on to say that he will make the payment if Mr. Cushing will give a "covenant to have the mortgage severed, say within ninety days," intimating that, if Mr. Cushing finds himself unable to do what he covenants to do, he can probably arrange for prepayment on favourable terms. Mr. Cushing replies that, as payment has not been made as agreed, he considers all arrangements cancelled.

The plaintiff by his statement of claim asks for: (1) specific performance; (2) liberty to pay into Court the purchase-moneys under the said agreement to an amount sufficient to indemnify the plaintiff against the principal and interest due or accruing due under the said mortgage; (3) specific performance to the extent that the defendants are able to carry out this said agreement of sale with the plaintiff, with an abatement of the purchase-money sufficient to indemnify the plaintiff against the principal and interest due or to accrue due under the said mortgage; and, in the alternative, damages.

It is, perhaps, not insignificant that the plaintiff has not asked in his claim for what he demanded before action, but something entirely different. It is not improbable that his

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reason for this was, that in the innumerable reported cases of specific performance he was unable to find any similar claim not merely recognised, but even suggested.

There are, however, cases in which the purchaser has been permitted to pay instalments of the purchase-money into Court for his protection when the title was incumbered or defective: see Armstrong v. Auger, 21 O. R. 98, and cases referred to; but my attention has not been called to any such case in which the plaintiff has not been the vendor seeking to enforce payment of the instalments, and it has been permitted simply on the principle that the purchaser should not be required to put himself in the position where he might have to pay more than the purchase-money for his title.

In the present case, the remaining payments under the agreement were several thousand dollars more than the amount of the mortgage, in addition to the fact that the mortgagee had for security other lands against which the plaintiff could have recourse if he were called on to pay it off, the value of which was several times the amount of the mortgage.

The principle of these cases, therefore, has no application to the present. In Wilson v. Williams, 3 Jur. N. S. 810, at the time the contract was entered into, the vendor distinctly assured the purchaser that his wife would bar her dower. She, however, refused; and, in the plaintiff's action for specific performance, Wood, V.-C., permitted a sufficient portion of the purchase-money to be set aside to meet the claim for dower, the vendor being permitted to draw the interest during the joint lives of himself and wife.

In that case, however, there was the distinct assurance that the dower would be barred, while in the present the representation made by the defendants, according to the evidence of Kenwood, was, that, if the plaintiff wished to pay up in full, the defendants would endeavour to procure a discharge of the mortgage, in which event the plaintiff would be called on to pay his proportion of the bonus demanded. There was, however, no suggestion of procuring any arrangement with the mortgagee to sever this security, as subsequently demanded by the plaintiff, though he admits that he knew that it covered all of the lots.

In Fry on Specific Performance, par. 127, it is stated: "If the purchaser is, from the first, aware of the vendor's incapacity to convey the whole of what he contracts for, he

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cannot, generally, insist on having, at an abated price, what the vendor can convey."

Consequently, even if the plaintiff had performed his part of the contract and were in no way in default, his right to have anything but what the defendants can convey at the agreed price seems doubtful; but, in my opinion, his case is much weaker than that.

Under the English authorities, a claim for damages, when a vendor cannot convey by reason of defect of title, is limited to the amount of the purchase-price which has been paid, which is nothing in this case. The plaintiff, therefore, is limited to an appeal to the equitable jurisdiction of the Court; and must, therefore, shew that he has done what he agreed to do, and is entitled, therefore, to call on the defendants to do what they agreed to do. In this he fails at the threshold, for he has not merely failed, but positively refused, to do what he agreed to do.

The terms of the agreement as to payment, viz., $10,000 cash on the signing of this agreement, the receipt of which is hereby acknowledged," leave no room for doubt that the intention was, that, at the time the defendant's signature to the agreement was to become effective, the $10,000 should be in his hands. It would undoubtedly be the part of prudence for any purchaser to ascertain the state of the title before paying any portion of his purchase-money; but, if he intends to act like a prudent man, he should not agree to pay it before he can have an opportunity of investigating the title if he has not done so before; and, if he does agree to pay it before investigating the title, then it is the duty of the Court, not to make an agreement which it thinks a wise man in his own interest should have made, but to enforce the agreement which the parties have actually made.

In Gamble v. Gummerson, 9 Gr. 193, at p. 198, Esten, Vice-Chancellor of Upper Canada, said, "A purchaser, in the absence of a special agreement, is not bound to pay, except as a deposit, a particle of the purchase-money, until a good title is shewn, and the estate is discharged from incumbrance." The present case falls within the exception specified of a special agreement to pay, on the signing of the agreement. The agent had instructions not to deliver up the agreement until the plaintiff paid the $10,000; but, on the plaintiff asking him to let him shew it to his solicitor, he gave him not one only but both duplicates. Whether,

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after the solicitor had learned of the defect of title, the plaintiff could have repudiated the contract on that ground, in view of his prior knowledge, need not be considered, for the defendants did not seek to bind him by it. He himself deliberately repudiated it, by refusing to observe its terms; and, on that ground alone, it appears to me that the Court cannot grant his claim for specific performance. In Mr. Wallbridge's letter, which is in part quoted above, he stated that the plaintiff refused to accept the defendants' title, and that he must have something which had not been agreed on which he then demanded, but which he does not ask for in this action. The plaintiff, no doubt, did nothing to lead one to suppose that he did not want the property; but, in my opinion, that is not the material point. It surely could not be contended that, if a purchaser of property for $10,000 absolutely refused to pay $10,000, but insisted on his wish to have the property for $5,000, he could be considered as maintaining an agreement to purchase for $10,000. The plaintiff absolutely refused to carry out the agreement he had entered into; and it can hardly be said that he did not repudiate it because he was willing to do something else which had not been agreed. When one considers the equities, leaving aside the bare rights, I admit that the plaintiff's position does not appeal to me with any force. As pointed out, the payment of the $10,000 would in no way put him in any danger of having to pay more than the agreement called for, and his offer to take a personal undertaking from one of the vendors that he would do something which he might or might not be able to do, shews that he did not consider it necessary to rely altogether on the title. Yet, notwithstanding that, he refused to pay what he had agreed to pay until some indefinite time in the future.

Coming to the conclusions I have, for the reasons stated, it is not necessary to consider the effect of the provision of the agreement giving the vendors power to cancel, on notice, on the purchaser's default, and the notice given, nor, since nothing has been asked for in the claim such as was asked before action, is it necessary to consider how a judgment could be given directing the defendants to do something which there can be no assurance can be accomplished.

I would dismiss the appeal with costs.

*Appeal allowed;* HARVEY, C.J., *dissenting.*

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## MANITOBA.

MACDONALD, J. OCTOBER 5TH, 1911.

CHAMBERS.

### MARION v. WINNIPEG ELECTRIC R. W. CO.

*Trial—Order for Jury—Action under Lord Campbell's Act.*

**In an action brought under the Act respecting Compensation to the Families of Persons killed by Accident, R. S. M. 1902 ch. 31, sec. 3, an order was made for trial of the issues by a jury.**

Motion by the plaintiff for an order directing the issues to be tried by a jury. The plaintiff was the administrator of the estate of Severin Marion, and the action was brought for damages for the death of Severin Marion, caused, it was alleged, by the negligence of the defendants.

H. P. Blackwood, for the plaintiff.

R. D. Guy, for the defendants.

MACDONALD, J.:—It is urged by counsel for the defendants that the action being brought under the provisions of Lord Campbell's Act, it should not be tried by a jury; that no action brought under that Act should be so tried, except those which the Rules specifically apply to, such as actions under the Workmen's Compensation for Injuries Act.

From the Rules governing trial by a jury I cannot see any reason why this action should not be tried by a jury as well as where the person injured brings the action.

It is provided by our Act respecting compensation to the Families of Persons killed by Accident, R. S. M. 1902 ch. 31, sec. 3: "Every such action shall be for the benefit of the wife, husband, parent, child, brother, and sister of the person whose death has been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased, and in every such action the

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Judge or jury may give such damages as he or they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action has been brought"—thus contemplating a trial by a jury.

I make the order asked for. Costs to be costs in the cause.

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THE

# Western Law Reporter

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## ALBERTA.

FEBRUARY 3RD, 1912.

SUPREME COURT EN BANC.

## SMOLIK v. WALTERS.

*Master and Servant—Injury to Servant—Dangerous Machinery in Mill—Absence of Negligence — Finding of Trial Judge — Improvements in Machinery to Prevent Accidents — Workmen's Compensation Act, 1908, secs. 3, 4—Application to Judge at Trial to Fix Compensation — Time-limit — Action not Brought within Six Months.*

The plaintiff, while operating a lath machine in the defendants' saw-mill, was injured by being struck in the eye by a splinter:—

*Held*, upon the evidence, affirming the judgment of STUART, J., who tried the action without a jury, that no negligence on the part of the defendants was shewn, and the action was properly dismissed; BECK, J., dissenting.

*Per* HARVEY, C.J.:—The question for the Court was, not whether there was evidence which would justify a jury's finding of negligence, but whether, on the facts of the case, the Judges of the Court, as jurors, would conclude that the defendants had been guilty of negligence from which the injury resulted. It was not necessary to consider whether any of the suggested improvements ought reasonably to have been made by the defendants before the accident; for, even if they had been made, they would have had no effect in preventing the accident; and the defendants had discharged their duty in the instructions and oversight they gave to the plaintiff.

*Per* BECK, J.:—The machine was obviously dangerous; the workman—the plaintiff—was inexperienced; a means for protecting the operator had long been known and in use; the employer ought to have known of it and used it; it would in all probability have prevented the accident; the accident occurred in a moment, and it is not possible to say with certainty what was the cause of the accident; under these circumstances, the onus is on the defendants to relieve themselves of responsibility.

Having failed to establish negligence, the plaintiff's counsel applied to the trial Judge, under sec. 3, sub-sec. 4, of the Workmen's Compensation Act, 1908, to fix compensation:—



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*Held* (BECK, J., hesitating), that the application was properly refused, on the ground that the Court's jurisdiction to fix compensation was limited to cases in which the action had been brought within six months of the date of the accident, being the time prescribed by sec. 4 within which the claim for compensation under the Act is to be made.

Construction of secs. 3 and 4 of the Act.

*Dictum* in *Cribb* v. *Kynochs Limited* [1908] 2 K. B. 551, followed.

Appeal by the plaintiff from the judgment of STUART, J., dismissing an action for damages for negligence.

The appeal was heard by HARVEY, C.J., SCOTT, BECK, and SIMMONS, JJ.

H. A. Mackie, for the plaintiff.

G. B. Henwood, for the defendants.

HARVEY, C.J.:—The plaintiff, while operating a lath machine in the saw-mill of the defendants, was injured by being struck in the eye whereby he lost the sight of his eye. The action is for damages for negligence, and was dismissed by my brother Stuart, who came to the conclusion that no negligence had been shewn.

The lath machine in question consisted of several saws, which sawed up into laths bolts of wood, which, being started by the operator under a feed-roller, were fed by it to the saw. The plaintiff was engaged in operating this machine at the feeding end, his work requiring him to place the end of the bolt of wood on the feeding table up immediately against the end of a bolt being fed under the feed-roller, so that there would be a continuous line of bolts passing through. To obtain the bolts to place on the table, he was required to reach over to where they were, in which act he would bend his whole body. While in the act of reaching, the accident occurred. No one saw it but the plaintiff, and naturally he can give no very clear account of it, but the conclusion apparently reached by the only expert called by the plaintiff, and which seems on the evidence to be probably correct, is, that, for some reason, the bolt was forced back by the saws under the feed-roller (the plaintiff says it was crushed up and the roller jumped up), and a splinter from it driven with such force as to cause the injury.

The plaintiff was not an expert, and spoke little English; but when he was employed, the foreman pointed out to him the danger of bolts becoming fast, and shewed him how to

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raise the roller, and pointed out the necessity of keeping out of the way when they were forced back. After he was employed, each day the foreman watched his work, though apparently he found it unnecessary to give him any further instructions. After the accident, a shield was placed on the side of the roller, which, no doubt, deflected many splinters; but, if the accident were caused as above indicated, it could have had no effect in preventing this accident, even if it had been in place then. A heavier weight was placed on the roller also, but it is doubtful whether it could have had any effect; for, from the evidence, it is clear that there is no way of avoiding bolts becoming stuck and being driven back.

The expert mentioned says: "A lath machine, the best you can do with them, the best guard you can put on, they are a dangerous machine to deal with." And again: "Q. That is one of your principal dangers, being in the way when a bolt flies out? A. Yes." He also says: "If I were operating that machine, or even managing it, I would put a shield, probably a 16-inch shield, right on that place you see there, and I would let it go down so low that, if the feed did rise, it would catch the flying parts driven back by the saw."

Whatever the witness intended, it is apparent that, since a sufficient space must be left open to permit the bold to pass in and also to let it pass back when it gets fast, no shield could guard that space, which, the evidence satisfies me, is most probably the space through which the splinter that did the injury came.

In McArthur v. Dominion Cartridge Co., [1905] A. C. 72, Dominion Natural Gas Co. v. Collins, [1903] A. C. 640, and Caledonia Milling Co. v. Grand Trunk R. W. Co., 14 O. W. R. 394, the jury had found negligence causing the injury, and the Court held that there was evidence to justify the finding. The question I have to consider here is, not whether there is evidence which would justify a jury's finding of negligence, but whether, on the facts of the case, I, as a juror, would conclude that the defendants had been guilty of negligence from which the injury resulted; and, I have no hesitation in saying that I quite agree with the trial Judge that the evidence does not establish negligence. I do not find it necessary to consider whether any of the suggested improvements ought reasonably to have been made by the defendants before the accident; for, in my opinion,

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even if they had been made, they would have had no effect in preventing the accident. The defendants appear also to have discharged their duty in the instructions and oversight they gave to the plaintiff. The case appears to me to be an even stronger one in the defendants' favour than that of Williams v. Western Planing Mills Co., 16 W. L. R. 13, in which this Court held that there was no negligence shewn—in that, in the present case, a more probable inference of the nature of the accident can be made.

Having failed to establish negligence, the plaintiff's counsel applied to the trial Judge, under sec. 3, sub-sec 4, of the Workmen's Compensation Act (ch. 12, 1908), to fix compensation. This application was refused, on the ground that the Court's jurisdiction to fix compensation was limited to cases in which the action had been brought within six months of the date of the accident, being the time prescribed by sec. 4 within which the claim for compensation under the Act is to be made. The Act distinctly provides (sec. 3, sub-sec. 2 (6) ) that an injured person may either claim compensation under the Act or may claim damages for negligence without regard to the Act. It also provides (sec. 3, sub-sec. 4) that, having elected the second alternative and having failed on that, he may still ask for compensation, but only on the conditions mentioned, namely, if the action is brought within the time limited by the Act for taking proceedings. The only limit of time fixed by the Act is that in the next section, which provides for a notice of accident, as soon as practicable, and a claim for compensation within six months.

In Powell v. Main Colliery Co., [1900] A. C. 366, it was held that the making of an informal claim for compensation within six months was a sufficient commencement of proceedings; and in Cribb v. Kynochs Limited, [1908] 2 K. B. 551, the opinion was expressed that in an action such as this, begun after the six months, the Judge would have no jurisdiction to fix compensation under the Act, the English Act being in the same terms. It is urged that this opinion, being obiter, is not binding on this Court. I should hesitate, however, to disregard the opinion of the Judges of the Court of Appeal, even though I held a different view: but I have no hesitation in accepting it when it appears to me the only reasonable interpretation that can be given to the wording of the provision.

The appeal should be dismissed with costs.

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SCOTT and SIMMONS, JJ., concurred.

BECK, J. (dissenting):—This is an appeal from the judgment of Stuart, J., dismissing the plaintiff's action for negligence, and declining to assess compensation under the Workmen's Compensation Act. The learned trial Judge states that he rests his judgment on the question of negligence on the ground that "it was not established to his satisfaction that the accident would not have occurred if the guard, which is now there, had been there when the accident happened." The learned Judge, in an earlier place, says that, with a good deal of hesitation, he had come to the conclusion that the defendants did provide reasonably safe machinery. It seems, however, that, in coming to this hesitating conclusion, the learnel Judge took a view with regard to the duty of operators of dangerous machinery which, with due respect, is, in my opinion, incorrect. The guard which the learned Judge refers to was attached to the machinery after the accident. He was not satisfied that such a guard as that would have prevented the accident. It is, however, particularly to his view expressed as follows that I take exception: "Indeed, so far as the evidence goes, it was not shewn that, in this country at any rate, it was ever the custom to have guards on such machinery as that. There was some reference to guards being used in Montana; but the evidence in regard to the custom in Ontario and Alberta is that a guard is not common upon such a machine—is not used." The evidence is, that a shield similar to the one now attached to the machine, but higher, and covering also the greater portion of the feed-wheel next to the operator, has been in use for 15 years or so in Montana, and is insisted upon. The learned Judge, in referring to this evidence, in no way suggests that he does not believe it. He takes it as correct, and says that the evidence is, that such a guard is not used in Ontario or Alberta. This evidence is, to my mind, of the vaguest character as to Ontario, and covers one or two mills in remote parts only. But it seems to me that the machine, being obviously a dangerous one, and known devices being in use for the protection of workmen for a sufficient length of time to become generally heard of, it is the duty of an employer of ordinary prudence to make use of them; and the fact of his not investigating and keeping up to date in his knowledge of such things should not ex-

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cuse him, nor the fact that in some localities such improvements are not yet adopted. Feeling that the learned trial Judge gave too much force to the evidence—which, to my mind, was very vague and unsatisfactory—of the alleged custom in Ontario and Alberta against the use of shields on such machines as that in question here, and seeing that, even so, his conclusion was arrived at with hesitation, I venture to differ from him in his finding that the defendants did provide reasonably safe machinery. He goes on to say that he has the gravest doubt whether a guard would have prevented the accident. In the first place, it seems he was referring only to such a guard as was afterwards put on, and not to such a guard as the witness who spoke of what was common in Montana described. I would hold the defendants responsible on this ground: the machine was obviously dangerous; the workman—the plaintiff—was inexperienced; a means for protecting the operator had long been known and in use; the employer ought to have known of it and used it; it would in all probability have prevented the accident; the accident occurred in a moment, and it is not possible to say with certainty what was the cause of the accident; under these circumstances, the onus is on the defendants to relieve themselves of responsibility: McArthur v. Dominion Cartridge Co., [1905] A. C. 72; Dominion Natural Gas Co. v. Collins, [1909] A. C. 640; Caledonia Milling Co. v. Grand Trunk R. W. Co., 14 O. W. R. 394; Lindsay v. Davidson, 17 W. L. R. 588, 19 W. L. R. 423.

In my opinion, therefore, the appeal should be allowed and judgment entered for the plaintiff, with costs in the Court below and the costs of the appeal, and the case be sent back for an assessment of damages.

As the majority of the Court take the view that the appeal should be dismissed, I express an opinion on the other branch of the case, with which, in that event, it is necessary the Court should deal.

The learned trial Judge having dismissed the action, counsel for the plaintiff then applied to the Judge to fix compensation under the Workmen's Compensation Act (ch. 12, 1908). This was refused, on the ground that compensation can be fixed in such a case (sec. 3, sub-sec. 4) only if the action which is dismissed is brought "within the time hereinafter in this Act limited for taking proceedings." and was not brought within that time. Section 4 of the

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Act provides that "proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice in writing of the accident has been given as soon as practicable after the happening thereof, and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury." Then follow provisions which declare that some of a variety of circumstances will cure the want of, a defect or an inaccuracy in, the notice. It was virtually admitted on the argument that the plaintiff was entitled to the benefit of these curative provisions with regard to notice, and the argument was virtually directed to the point that "the claim for compensation" was not made within six months from the occurrence of the accident.

Powell v. Main Colliery Co., [1900] A. C. 366 (H. L.), held that "the claim for compensation" means, not the initiation of proceedings before the tribunal by which compensation is to be assessed, but a notice of claim for compensation given to the employer.

Lowe v. M. Myers & Son, [1906] 2 K. B. 265 (C. A.), held that "the claim for compensation" need not even be in writing.

Thompson v. Goold & Co., [1910] A. C. 409 (H. L.), held that the claim need not specify any sum.

Section 4, proviso (c), provides that failure to make a claim (i.e., a claim for compensation, as distinguished from notice of accident) within the period above specified (i.e., six months from the occurrence of the accident) shall not be a bar to the maintenance of such proceedings (i.e., "proceedings for the recovery under this Act of compensation"), if it is found that the failure was occasioned by mistake, absence from the province, or other reasonable cause. See Roberts v. Crystal Palace Football Club, 3 Butt W. C. C. 51 (C. A.)

Cribb v. Kynoehs Limited, [1908] 2 K. B. 551 (C. A.), held that the latter proviso could not be given effect to, so as to sustain proceedings under the Act, after the dismissal of an action for negligence in respect of the same occurrence. It would seem that all the members of the Court were of opinion that, as was the case there, the action having been brought after the lapse of six months from the occurrence of the accident, the plaintiff had had

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no right to have an assessment of compensation under the Act made in the action, inasmuch as that right is given only under sec. 3, sub-sec. (4), wherein that right is limited —if, within the time hereinafter in this Act limited for taking proceedings (i.e., under the Act), an action is brought to recover damages independently of the Act. The question was not before the Court whether the words "within the time hereinafter . . . limited" refer solely to the words "six months" occurring in sec. 4, or embrace also the words of the proviso (b) (which I have already quoted) to that section, whereby it is provided that the failure to make a claim "within the period specified above shall not be a bar, if it is found (as a fact) that the failure was occasioned by mistake," &c. With some little hesitation, I have come to the conclusion that, in order to entitle a plaintiff to an assessment of damages in an action, the action must be brought within six months of the occurrence of the accident, and that there is not in the Act anything which for that purpose extends that period or enables it to be extended. The plaintiff's action was brought after the lapse of six months from the occurrence of the accident, and on this ground, therefore, I concur in the opinion that he cannot succeed in his claim for compensation under the Act.

*Appeal dismissed;* BECK, J., *dissenting.*

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## ALBERTA.

FEBRUARY 3RD, 1912.

SUPREME COURT EN BANC.

### ALBERTSON v. SECORD.

*Injunction—Ex Parte Interim Order—Undertaking as to Damages — Dissolution of Injunction—Order Directing Inquiry as to Damages—Question of Liability—Proof of Damage Incurred—Grounds for Injunction—Action to Set aside Fraudulent Transfer of Property Brought by Non-judgment Creditor—Necessity for Suing on Behalf of all Creditors—Injunction against Further Transfers —Irregularity in Writ of Summons—Facts Involved in Action—Discretion as to Directing Inquiry.*

An appeal by the defendant from the judgment of SIMMONS, J., awarding the plaintiff $450 damages, upon the trial of an issue as to

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what damages, if any, had been sustained by the plaintiff, by reason of an interim *ex parte* injunction obtained against her in a previous action, by the defendant in the issue, which the plaintiff, according to the practice of the Court, ought to pay, was dismissed, by reason of an equal division of opinion in a Court composed of four Judges.

The Judge who directed the trial of the issue did not in fact determine the question of the liability of the defendant in the issue to pay damages, but intended to leave that question to be tried as part of the issue. The trial Judge, SIMMONS, J., however, assumed that the question of liability was determined by the order directing the trial of the issue, and simply assessed the plaintiff's damages:—

*Held, per Curiam*, that, as the question of liability had not been passed upon, the Court should determine it upon the appeal.

*Per* HARVEY, C.J., and STUART, J.:—The interim injunction order was improperly issued, and was properly dissolved. The whole proceeding was simply an attempt to get equitable execution in regard to certain trust moneys before any judgment had been recovered. The plaintiff had proved damage by reason of the injunction, and the amount assessed was reasonable.

*Per* SCOTT, J.:—The evidence shews that, if the original action in which the injunction was obtained had been properly launched, the present defendant had reasonable grounds for insisting that action in the proper form and obtaining an injunction restraining the plaintiff from dealing with the fund in question until the trial of that action. The action, however, was improperly launched, and the injunction was dissolved without reference to the merits. If the undertaking in the injunction order had been merely to pay such damages as the plaintiff might sustain, without more, the plaintiff would undoubtedly be entitled to recover any damages she might have sustained; but, where it is left to the discretion of the Court to say whether the defendant ought to pay any, the Court should, in the exercise of that discretion, attach more importance to the circumstances of the case and the nature of the action than to defects in the proceedings in the action.

*Per* BECK, J.:—Under the system of the Judicature Act, the reason for a non-judgment creditor suing on behalf of all other creditors as well as himself, in an action to set aside a transfer of property by the debtor, is gone. Where the debtor has fraudulently transferred property, the Court will enjoin further transfers until the creditor can obtain judgment in his action to impeach the conveyance. The order dissolving the *ex parte* injunction was, therefore, upon the grounds mentioned by the Judge who made it, wrong; and a sufficient *primâ facie* case had been shewn as the basis for the injunction. The omission of the transferee's name from the writ of summons made the writ irregular; but, as a writ of summons cannot be issued without a statement of claim being annexed to it, and the writ expressly refers to the statement of claim as annexed, the two should be taken as one, with the result that the transferee, who was named as a defendant in the statement of claim, was a defendant to the action. The plaintiff in the issue, the transferee, shewed no case for an inquiry, inasmuch as she had not proved that the injunction was improperly granted, upon a consideration of the facts involved in the action; and proof of that was an essential element of her right to an inquiry, and the onus of proof was upon her. The mere vacating of the injunction, if nothing more appeared, would not be sufficient; and no case was made to shew that the defendant in the issue, the plaintiff in the original action, "ought to pay" any damages at all. The undertaking is not a contract with the defendant; neither can action be brought upon it. It is an obligation to the Court. Looking at its form, and considering the common practice of the Court, it is an obligation which is conditional—which becomes absolute only upon the Court, as a condition precedent to liability, finding that the case, in view of all the circumstances, is a proper one in which to direct an inquiry.

An appeal by the defendant and a cross-appeal by the plaintiff from the judgment of SIMMONS, J., rendered on

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the trial of an issue as to whether the plaintiff in the issue, Addie Albertson, had suffered any damages by reason of an interim ex parte injunction obtained against her by the present defendant, who was plaintiff in the suit in which the injunction was granted. The trial Judge awarded the plaintiff $450 as damages. From this judgment the defendant appealed, and the plaintiff cross-appealed, seeking to increase the amount of the damages awarded.

The appeal was heard by HARVEY, C.J., SCOTT, BECK, and STUART, JJ.

Frank Ford, K.C., for the defendant.

C. C. McCaul, K.C., for the plaintiff.

STUART, J.:—The order for the trial of the issue was made by the Chief Justice, and it is in these words: "That an issue be and is hereby directed as to what damages, if any, have been sustained by the defendant, Addie Albertson, by reason of the injunction herein, which the plaintiff, according to the practice of this Court, ought to pay." The order also contained a clause setting the issue down for trial and directing the parties to file pleadings; that is, that Addie Albertson, the complaining defendant, should file a statement of claim and that the plaintiff should file a statement of his defence against the claim for damages.

When the issue came on for trial before Mr. Justice Simmons, the defendant in the issue, Secord, contended that the question whether or not he ought in any case to have damages assessed against him was still open, and should be considered by the trial Judge. The plaintiff in the issue, on the other hand, contended that the only question open for the Court to deal with was the amount of the damages, if any. Mr. Justice Simmons took the latter view. The respondent in the present appeal, the defendant in the issue, now raises the same point before us, as to the proper interpretation of the order of the Chief Justice. No written reasons for judgment were given by the Chief Justice when he made the order, and the form of the order seems to have been settled by consent of the parties. The Chief Justice stated in the argument before us, and so informs us, that he is strongly of the impression that he did not intend to decide the question of liability, but intended to pass the whole matter on to be dealt with by the trial Judge in a

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more formal way. The result is, that it does not distinctly appear that the initial question was really ever decided at all. The Chief Justice does not think he intended to decide it. Mr. Justice Simmons held that it was already decided before the matter reached him. There is no doubt that, upon the authorities which have settled the practice in England, the view taken by Mr. Justice Simmons is correct, namely, that where a defendant who has been enjoined comes into Chambers after the matter has been finally determined in his favour and asks for an inquiry as to damages, the Judge who hears that application, before directing a reference or an issue, first decides the preliminary question whether, in the circumstances of the case, there should be inquiry or an issue at all or not. But, on the other hand, it is to be observed that this is merely a question of practice, and we are not so strictly bound by English decisions upon points of practice. There is really no reason in the nature of things why a Judge, when such an application comes up, perhaps on a crowded Chambers day, might not very well say: "I haven't time now to go fully into this question. The whole matter had better be dealt with more deliberately at a more convenient time and place." And this is, apparently, what the Chief Justice intended to do. There are features in the order also which corroborate the view that a different rule of practice was here adopted. The order refers to damages "which, according to the practice of this Court, the plaintiff ought to pay." The practice of the Court can have nothing to do with the amount or the remoteness of damage, but the phrase could have some sensible reference to the question of liability. Then again, pleadings were to be filed. This looks much as if the idea was to have the matter proceed as if the rule against commencing an action did not exist. The parties were before the Court already, and all that was really needed was pleadings. The statement of claim sets forth a ground of liability in addition to specifying the damages suffered.

In any case it is quite clear that, so far, no Judge has really adjudicated upon the matter, and, in all the circumstances, I think that it is not only open to us, but that we are bound, to do so.

The question arises in this way. On the 27th August, 1910, Secord began an action in the Supreme Court against certain defendants. I have, I think not improperly, looked at the præcipe for the writ. It is directed to the Clerk of

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the District Court of the Judicial District of Edmonton. It was accepted and filed by the Clerk of the Supreme Court, and treated as authority for the issue of a writ from his office. The defendants named in the style of cause in the præcipe, which was typewritten, are Andrew Albertson, Frederick P. Hobson, Elmina Hobson, and Aggie Albertson, the last name being added by pen. But the præcipe asks for a writ only against the first three, and the writ, when issued, only named the first three. The statement of claim, however, attached to the writ, as well as the copy left with the Clerk, named Aggie Albertson as a defendant. The statement of claim set forth the history of certain dealings between the plaintiff and the defendants other than Aggie Albertson, in regard to a partnership in certain coal lands, and stated that, in consequence of these dealings, the defendant Andrew Albertson was indebted to the plaintiff in the sum of $5,119.50. It was further alleged that the defendant Andrew Albertson had, in August, 1910, placed to the credit of the defendant Aggie Albertson large sums of money in the Great West Permanent Loan Company for the purpose of preventing the plaintiff from realising on the same, and that these moneys still remain the property of the said Andrew Albertson; or, in the alternative, "if the same have been given to the said Aggie Albertson, the same is a preference as against the plaintiff." Curiously enough, it was not alleged that Aggie Albertson was a creditor of her husband Andrew Albertson, so that the suggestion of a preference is absolutely unintelligible. There was no allegation that the money had really been given to the wife; that, as between husband and wife, the property had passed, but that the gift was fraudulent and void as against creditors under the Statute of Elizabeth. In substance and in fact the allegation made was, that the moneys in question had been and still remained the property of the husband, but had been deposited in the wife's name. This clearly amounts to nothing more than an allegation that the wife held the money as trustee for her husband in a trust account.

The statement of claim concludes with a prayer for an injunction restraining the husband and wife from withdrawing any of the said sums of money from the company with which they were deposited, and restraining the company from paying the money out to either of them; and (2) for a declaration (not that any gift was fraudulent and void as against creditors), but that the moneys so deposited were "liable to the plaintiff's claim herein."

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Upon the day on which the writ was issued, the plaintiff applied to Mr. Justice Beck for and obtained an ex parte interim injunction restraining the husband and wife according to the prayer of the statement of claim. Also upon the same day, the plaintiff issued a garnishee summons directed to the Great West Permanent Loan Company; and, in a most reprehensible way, which cannot be too strongly condemned, procured the Clerk of the Court, who should have known his business better than to allow such a thing, to insert in the garnishee summons certain words which are not provided for in the statutory form at all. The garnishee summons reads: "And it is alleged on affidavit filed that you are indebted to the said defendant Andrew Albertson, *part of whose moneys are deposited with you in the name of Aggie Albertson.*" I have italicised the words improperly inserted. This was a suitable ending to a whole series of slipshod practice.

On the 9th September, the wife appeared in her real name as Addie Albertson, and the defendant Andrew Albertson, her husband, obtained, on motion, an order from Mr. Justice Scott dissolving the injunction. The reason given for the dissolution of the injunction was, that the action was improperly framed, inasmuch as the plaintiff did not sue on behalf of himself and all other creditors. On the 12th September, the plaintiff filed a discontinuance of the action, and began another, with which I do not think we are here concerned.

On the 30th September, the application above referred to was made to assess the damages suffered by Addie Albertson by reason of the injunction. With respect, I am of opinion that the injunction was improperly issued, if not for the reason given by Mr. Justice Scott in dissolving it, then for a different one. The action was in no way an action to set aside a gift or conveyance as void against creditors. As I have pointed out, there was no allegation whatever that the husband had made a gift to his wife; there was no prayer that any gift be set aside. There was absolutely nothing more than an allegation that these moneys belonged to the husband; there was no suggestion that, as between him and his wife, they belonged to her, except a faint one in the peculiar hypothetical phrase which I have already quoted, and which leads to the absurd statement about a preference. The whole proceeding was simply an attempt to get equitable execution in regard to certain trust moneys before any judg-

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ment had been recovered. I know of no authority for such a course. In view of the looseness with which everything was done, I cannot think it right to attempt to put any generous interpretation upon the statement of claim in the then plaintiff's favour. He ought to be confined, especially where he seeks the extraordinary remedy of an injunction, simply to what he actually alleges.

It may be said that the distinction between a gift to the wife and a deposit of money in her name in the bank is so fine as to be properly disregarded; but, however difficult it might ultimately be to make the distinction clear in evidence and to prove an actual gift, this is no excuse for not making the necessary allegation of a gift in an exact and definite form in the statement of claim. The real reason for not alleging a gift was, I imagine, because the garnishee summons could in such case have no effect, and the peculiar insertion made in that document simply confirms the view that the plaintiff never intended to allege any gift.

This being so, I think the plaintiff in the issue is entitled to damages, if any are proven. The trial Judge refused to allow any damages in respect to a certain option for the purchase of coal lands, which it is alleged the present plaintiff was prevented, not from taking up finally, but from obtaining at all by reason of her money being tied up by the injunction. I am of opinion that the learned Judge was right in refusing these damages. The whole position of the plaintiff was too uncertain. Kenwood, from whom she expected to get an option, had himself, as he stated in his evidence, only an option from one Hutton. This alleged option was not put in evidence. Kenwood said he had it in his possession when in the witness-box; but, upon his expressing a wish not to reveal its contents, it was not filed, and its contents were not stated. We have, therefore, no evidence that Kenwood had himself an option at all. We have no evidence of its terms. Whether Kenwood could have turned it into a contract enforceable by specific performance, or not, is absolutely unknown to us. Furthermore, even if all this were plain and proven, an option is well known not to be assignable, and grave difficulties might have arisen between Hutton and Kenwood and the plaintiff upon that ground. Put in its bald form, the plaintiff claims damages because she was prevented, not from carrying out a contract, not even from obtaining a contract, but from obtaining an assignment, legally unenforceable, of an unknown some-

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thing not before us, but which a witness spoke of as an option. It is impossible, in my opinion, to allow damages on such an uncertain ground.

With respect to the damages allowed by the trial Judge for stopping the use of moneys deposited in the wife's name which were being used for paying the working expenses of a partnership business in drilling operations in which the plaintiff was engaged along with one Gilmore, it is to be observed that, in so far as this portion of the claim is concerned, there is a special and stronger ground for allowing damages. It is quite clear from the evidence, and indeed it is practically admitted, that, in so far as the second amount of $1,408.09 is concerned, the husband had no claim or interest in it at all. Even the wife was interested in it only jointly with another person, and she really held it in trust for the partnership of which she was a member. Yet the injunction clearly tied up this money, as well as the money standing in the larger account. If the injunction had been limited specificially to the one account of moneys deposited in the wife's name from a certain source, as is at least attempted to be done in the statement of claim, then the plaintiff would have been able to act freely with regard to the smaller account. It is impossible to say that the injunction did not interfere with it merely because a sum of $5,119.50 is mentioned, and then the costs, which are an indefinite sum. There was nothing in the injunction to shew what account was referred to. The plaintiff might quite possibly have been open to process for contempt if she had touched even the $1,408.09, and was not to blame if she took this view. The evidence, moreover, discloses that the bank did refuse to pay over any money at all, because they knew of the injunction. The amount allowed, $450 in all, is not large. There was evidence which shewed that in the past these operations had been quite profitable. There was evidence that the injunction suspended them for a time, and that it put the plaintiff and her partner to great inconvenience. While it was impossible to estimate with absolute accuracy and certainty the amount of the damages, there was certainly enough evidence to justify the trial Judge in concluding that some real damage had been suffered. Cheques given to employees were refused payment. Work did in fact have to be stopped. It is clearly a case in which the Judge was entitled to make a moderate and reasonable allowance for the damages which must have been suffered. The trial Judge heard

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all the evidence, and decided that $300 should be allowed for direct interruption of business and $150 for the inconvenience, loss of time, and expense which the plaintiff suffered. I am unable to say that he was so clearly wrong that we ought to interfere with his decision. Such damage as indicated was, I think, the natural and proximate result of the injunction. With regard to the contention that the garnishee summons may itself have caused the damage, I am of opinion that we should not give the defendant any advantage from such an illegal proceeding. The garnishee summons could not legally have had any effect, and the garnishees were not bound to regard it.

The appeal should be dismissed with costs, and the cross-appeal should also be dismissed with costs.

HARVEY, C.J., concurred.

BECK, J.:—On the 10th August, 1910, in an action in this Court, brought by Richard Secord against Andrew Albertson and others, I granted an interim injunction order in the following form, following in this respect the common practice of the Court not to accompany the interim injunction by a summons to continue, but leaving the defendants to move to vacate or vary:—

"Between Richard Secord, plaintiff, and Andrew Albertson, Frederick P. Hodson, Elmina Hobson, and Aggie Albertson, defendants.

"Upon the application of the above named plaintiff, and upon hearing counsel for the plaintiff, and the plaintiff undertaking to abide by any judgment this Court may make as to damages in case the Court or a Judge thereof is of the opinion that the defendants have suffered any damages by reason of this injunction which the plaintiff ought to pay:—

"It is ordered that the above-named defendants Andrew Albertson and Aggie Albertson, and their respective agents, each be restrained from using or in any way transferring or issuing cheques or orders on or paying certain moneys deposited by them or either of them in the Great West Permanent Loan Company to the extent of the plaintiff's claim, namely, $5,119.50, and costs of this action; and an injunction is hereby granted accordingly."

The statement of claim in that action is set out in full in the appeal-book, and, in my opinion, sets up sufficiently,

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though not artistically, a case to the effect that Secord was a creditor of Andrew Alberton, and that Albertson had, for the fraudulent purpose of defeating Secord and his other creditors, deposited the sum of money mentioned in the injunction order in the name of his wife, "Aggie Albertson," whose correct name, it now appears, is Addie Albertson. The allegations of the statement of claim which, I think, are fairly to be interpreted in this sense, are as follows: "The defendant Andrew Albertson in or about August, 1910, placed to the credit of the defendant Aggie Albertson large sums of money in the Great West Permanent Loan Company for the purpose of preventing the plaintiff from realising on the same; the said money so deposited still remains the property of the said Andrew Albertson."

The material upon which I granted the order is not before us, but I suppose it is to be assumed that it supported the case made by the statement of claim, and was sufficient to justify the order, subject to a consideration of objections which I am about to refer to.

Some time after, an application was made to my brother Scott, to set aside my order. On that application it appeared that, although Addie Albertson was named as a defendant in the statement of claim and in the order, she had not been named as a defendant in the writ of summons.

The result of the application was, that my brother Scott set aside my order, and gave leave to the plaintiff "to amend the writ of summons" by adding the name of Addie Albertson as a party defendant. This order was made on the 10th September, 1910.

My brother Scott's reasons for judgment are set forth at length in the appeal-book, and from them it appears that he set aside the order on two grounds: (1) that the plaintiff, being a non-judgment creditor, could sue only on behalf of himself and all other creditors; and (2) that, even had the action been so constituted, an injunction cannot be granted, except at the instance of a judgment creditor, restraining a debtor from dealing with his own property, citing Pacific Investment Co. v. Swan, 3 Terr. L. R. 125.

I have a recollection that, in granting the interlocutory injunction, I observed the fact that the plaintiff was not expressly suing on behalf of all the other creditors, but was then of opinion that, if this was a defect, it was the merest



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matter of form, which, under the Rule as to "non-compliance," I might disregard for the time being, inasmuch as, if necessary, the formal amendment might at any time be made. I have now come to the conclusion that, under the system of the Judicature Act, the reason for a non-judgment creditor suing on behalf of all other creditors as well as himself is gone, and that, therefore, this Court should declare that it is no longer necessary. Boyd, C., in Scane v. Duckett, 3 O. R. 370, goes almost to this extent.

In my opinion, too, the other ground put by my brother Scott was also not tenable in such a case as this, for the reason indicated in my decision in Fairchild v. Elmslie, 2 Alta. L. R. 115, sufficiently expressed in the head-note, which is as follows: "The Court will not, at the instance of a creditor, who is not a judgment creditor, interfere by injunction to prevent a transfer of property by a debtor; but, where the debtor has fraudulently transferred property, the Court will enjoin further transfers until the creditor can obtain judgment in his action to impeach the conveyance. Campbell v. Campbell, 22 Gr. 314. followed."

My opinion, therefore, is, with due respect to my brother Scott, that his order setting aside the interlocutory injunction, so far as based upon the grounds mentioned by him, was wrong; and that, so far as the sufficiency of the facts is concerned, there being no suggestion that they were inquired into on that application, it must be assumed that a sufficient prima facie case had been shewn as the basis for the interlocutory injunction.

There remains the question arising from the omission of Mrs. Albertson's name from the writ of summons. As to that, I am of opinion that, inasmuch as, under our system of procedure, a writ of summons cannot be issued without a statement of claim being annexed to it, and the writ expressly refers to the statement of claim as annexed, the two should be taken to be one, with the result that in this case, while the writ was irregular, Mrs. Albertson was, nevertheless, a party defendant to the action.

The action about which I have been speaking was discontinued, and on the 12th November, 1910, a new action was commenced by Secord, suing on behalf of himself and all other creditors of Andrew Albertson, against the same defendants, and setting up substantially the same case as in the former action, but charging fraud in undoubtedly sufficient form. On the same day, the Chief Justice granted an

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interim injunction order in this action similar in terms to that granted in the first action.

This second action was ultimately settled on the 28th September, by a cheque of Mrs. Albertson on the moneys in question, in this form:—

"Edmonton, Alta., Sept. 28th, 1910.

"The Great West Permanent Loan Company.

"Pay to the order of Messrs. Emery, Newell, & Bolton, $3,000.00/100, three thousand dollars, as per indorsement, and charge to account No. A5.

"Addie Albertson."

Indorsed: "In full of Secord (suing on behalf of himself and all others the creditors of Andrew Albertson an insolvent) and Andrew Albertson et al., defendants, and in payment of all moneys claimed in and causes of action set out in the said action————to the claim against Addie and Andrew Albertson————only, not to affect any claims which the said Secord has against the defendants F. & Elmina Hobson. Emery, Newell, & Bolton."

Besides these two actions, there was a third, an action by Joseph Hostyn, suing on behalf of himself and all other creditors of Andrew Albertson, against Albertson and his wife. The cause of action was similar to that in the other action, and in it Scott, J., granted a similar injunction on the 9th September, 1910. This action likewise was settled on the 28th September by a cheque upon the same fund for $495, which was in the following form:—

"Edmonton, Alta., Sept. 28th, 1910.

"The Great West Permanent Loan Company.

"Pay to the order of Robertson, Dickson, & Macdonald, $495.00/100, four hundred and ninety-five dollars, as per indorsement, and charge to account No. A5.

"Addie Albertson."

Indorsed: "Payment in full of Hostyn, suing on behalf of himself and all other creditors of A. Albertson, an insolvent, plaintiff, and A. Albertson et al., defendants, and all claims made in and causes of action set out in the said action, without prejudice to the rights of A. Albertson to recover back from the said Hostyn whatever, if any, shall be found to have been paid to the said Hostyn in excess of the amount actually due by him the said Albertson. Robertson, Dickson, & Macdonald."

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On the 22nd December, 1910, the Chief Justice made the following order in the first action of Secord v. Albertson et al.:—

"Upon the application of the defendants Andrew Albertson and Addie Albertson, upon hearing read the affidavits of Andrew Albertson, Richard Secord, and Andrew Alderson filed, and the pleadings and proceedings herein, and upon hearing what was alleged by counsel for the plaintiff and the applicant herein:

"It is ordered that the application of the defendant Andrew Albertson be dismissed.

"It is further ordered that an issue be and is hereby directed as to what damages, if any, have been sustained by the defendant Addie Albertson by reason of the injunction herein, which the plaintiff, according to the practice of this Court, ought to pay.

"And it is further ordered that the said issue be set down for trial before a Judge of the Supreme Court of Alberta at the next sittings of the said Court to be holden at Edmonton, in the province of Alberta.

"And it is further ordered that the defendant Addie Albertson deliver a statement of claim to the plaintiff within 10 days from the issue of this order, and the plaintiff shall deliver his statement of defence thereto within 5 days thereafter.

"And it is further ordered that such statement of claim and statement of defence, together with the reply (if any), which shall be delivered within 5 days of the delivery of the statement of defence, shall constitute the pleadings or record of the issues between the said defendant and the said plaintiff so to be tried.

"And it is further ordered that each of the parties to the said issue be at liberty to appear by counsel and prosecute or defend such issue as the case may be, or as they may be advised, and that they be bound by the finding of the Court or Judge upon the question, subject to appeal; and that they be at liberty to submit evidence and call witnesses on their own behalf as they may be advised; and that they be at liberty to examine all witnesses called at the said trial.

"It is ordered that the costs of this application and all subsequent costs be reserved to be dealt with by the trial Judge at the hearing of the said issue."

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In pursuance of this order, a trial took place before Simmons, J.

Objection was taken by counsel for Mrs. Albertson that this order concluded the question whether she was entitled to any damages, and left to the Judge solely the question of the quantum. The learned Judge took this view, but nevertheless admitted, subject to objection, the evidence tendered on Secord's behalf for the purpose of shewing that Mrs. Albertson was not entitled to recover any damages at all.

The learned Judge, adhering to his view, assessed the damages at $450, and gave Mrs. Albertson the costs. Secord appeals from this decision, and Mrs. Albertson makes a cross-appeal for an increase of the damages. The form of the order of the Chief Justice, which, of course, was not of his wording, but of both parties, for the solicitor for Secord approved of the form, to my mind, bears on the face evidence that the Chief Justice did not consider the preliminary question whether it was a proper case to direct an inquiry as to damages, but, by arrangement of the parties, adopted a procedure other than the usual one, and left that question, as well as the question of the quantum of damages, to the trial Judge. The Chief Justice has in any case informed us that that was his understanding, at the time, of the purpose and effect of the order; and, under these circumstances, I think we should so treat it; and, inasmuch as the trial Judge has not dealt with the preliminary question whether it is such a case as that an inquiry should be directed, we must now decide that question.

It seems to be clear enough that the undertaking is extinguished only by a determination of the action in favour of the plaintiff, or by agreement, though the Court may, where it is not extinguished, refuse to enforce it on the ground of misconduct or laches on the part of the party otherwise entitled to its benefit: Newby v. Harrison, 3 DeG. F. & J. 287; Ex p. Hall, In re Wood, 23 Ch. D. 644 (C.A.) Undoubtedly, the usual practice is, first, to determine whether an inquiry ought to be directed; and, if the Court or a Judge decides that it is a proper case in which to direct an inquiry, one is directed, in these or similar terms: "An inquiry whether the defendant has sustained any and what damages by reason of the injunction granted by the said order which the plaintiff ought to pay according to his undertaking contained in the said order:" Seton on Decrees, 6th ed., p. 519.

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What are the principles upon which the Court or Judge should act in deciding whether or not to grant an inquiry?

In Newby v. Harrison, supra, Turner, L.J., said: "A party who gives an undertaking of this nature puts himself under the power of the Court not merely in the suit, but absolutely; the undertaking is an absolute undertaking that he will be liable for any damage which the opposite party may have sustained, in case the Court shall ultimately be of opinion that the order ought not to have been made. . . . We must hear the case upon the question whether, under the circumstances, this jurisdiction ought to be exercised, for there may be cases in which the Court will not consider it just to enforce an undertaking, though the jurisdiction to do so exists."

In Bingley v. Marshall, 11 W. R. 1018, 9 L. T. N. S. 144, the Court, on the hearing of the action, held the plaintiff to be entitled to succeed in an action for specific performance, only on submitting to terms which he refused to accept. The action was, therefore, dismissed without costs. An application was made for an inquiry to ascertain damages payable under an undertaking of the plaintiff contained in an interim injunction order obtained ex parte. The reports of the case do not quite agree, and it is true that in the Law Times report it is stated that the Vice-Chancellor said that he could not see that the defendant had suffered any damage. Yet both reports seem to shew that the real ground of the Vice-Chancellor's decision was not that. In the Law Times it is said: "The Vice-Chancellor said that there were two cases in which the Court, in granting an injunction, required an undertaking as to damages: when an order was made upon an ex parte motion; and when, upon argument of the case, the balance of evidence appeared to be in favour of restraining the commission of the acts complained of and giving compensation for the restraint, if the right of the defendant should be completely established. . . . Now, where there was a probabilis causa litigandi, it would not be fair to put a plaintiff to any additional expense on account of an undertaking of this sort. That there was such a probable cause in this case, the Court had shewn to be its opinion, by giving no costs against the plaintiff. It would be absurd, therefore, to saddle him with other expenses which equally arose from the mere institution of the suit." In the Weekly Reporter it is put in this way: "It was quite

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plain that this Court could not have allowed the property to be dealt with during this litigation; and that the bill had not been filed without some foundation was shewn by his having dismissed it, not with, but without, costs. The present application was an attempt to extend the jurisdiction of the Court in respect of these undertakings in a manner that was never intended. The plaintiff was not wrong in coming to this Court, and it would be monstrous that he should be made to bear all the costs and damages incident to a litigation which the Court had thought he was right in instituting, though he had not succeeded at the hearing."

In Hessin v. Coppin, 21 Gr. 253, Blake, V.-C., refused an inquiry as to damages on account of his view of the conduct of the defendant. He said: "Where the plaintiff obtains an injunction on the usual undertaking, it is not as of course to give damages where the injunction is not continued or is dissolved. . . . I do not think the conduct of the defendant presents so meritorious a state of facts as compels me to grant the inquiry asked. I exercise the discretion which, under the authorities, appears to be vested in the Court in these cases, by refusing the application without costs."

In Graham v. Campbell, 7 Ch. D., James, L.J., says: "If any damage has been occasioned by an interlocutory injunction, which, on the hearing, is found to have been wrongly asked for, justice requires that such damage shall fall on the voluntary litigant who fails, not on the litigant who has been without just cause made so."

After quoting this passage, Boyd, C., sitting in Divisional Court, in Gault v. Murray, 21 O. R. 458, says (p. 462): "But if the defendant in such case has been made a party with just cause, even though he may succeed, it does not follow that he gets damages." And, in dealing with the case before him, refused to disturb the trial Judge's decision refusing an inquiry, though the plaintiff failed at the trial. He said (p. 463): "The Judge has believed this case to be of that suspicious character which invited investigation." Ferguson, J., concurred.

Smith v. Day, 21 Ch. D. 421, holds that the granting of an inquiry is very largely subject to the discretion of the Court—that before granting an inquiry the Court should consider all the circumstances of the case, including the question of the ground upon which, if it be so, the inter-

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locutory injunction was dissolved; for the Master of the Rolls says: "It may happen that an interlocutory injunction is dissolved for delay or some cause which disentitles the plaintiff to an interlocutory injunction, though not to relief at the trial. . . . Then again the Court must have regard to the amount of damages; if it be trifling or remote, the Court would not be justified in directing an inquiry as to damages, though the damages might not be so remote that an action would not lie. Then again the time at which the application is made is material."

In my opinion, the defendant Mrs Albertson shews no case for an inquiry, inasmuch as she has not proved that the interlocutory injunction was improperly granted, upon a consideration of the facts involved in the action; and I think proof of that is an essential element of her right to an inquiry, and that the onus of proof is upon her. I think the mere vacating of the injunction, if nothing more appeared, would not be sufficient, because non constat but that it was dissolved on some ground other than the merits; but here we have it quite clearly shewn that the injunction was set aside upon grounds which, even if my opinion that they are not tenable be incorrect, do not cover the substantial ground of complaint in the action, namely, the disposition of a fund belonging to the debtor for the fraudulent purpose of defeating or delaying his creditor. There is nothing to shew—and the way in which the action was settled appears to me to point rather the other way—that Secord would have failed to establish his case at the hearing, though even that would not be a final test of liability; and there is, therefore, in my opinion, no case made to shew that Secord "ought to pay" any damages at all.

As pointed out in Smith v. Day, supra, the undertaking is not a contract with the defendant; neither can an action be brought upon it. It is an obligation to the Court. Looking at its form, and considering the common practice of the Court, it is an obligation which is conditional—which becomes absolute only upon the Court, as a condition precedent to liability, finding that the case, in view of all the circumstances, is a proper one in which to direct an inquiry. Here we have only the fact that the injunction was set aside, on grounds which do not go to the merits, and no evidence on which to form the opinion that the justice of the case demands an inquiry.

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On this ground, I would allow the appeal and declare the defendant Addie Albertson not entitled to any damages. As to the costs, I would give no costs against her either of the application before the Chief Justice or the trial before Simmons, J., or of this appeal, because so much of these costs have arisen out of errors of the solicitors for the other side.

SCOTT, J.:—For the reasons I now state, I agree with the conclusion reached by my brother Beck.

The evidence shews that, had the original action in which the injunction complained of was issued been properly launched, the defendant had reasonable grounds for instituting his action in the proper form and obtaining an injunction restraining the plaintiff dealing with the fund until the trial of the action; and the authorities referred to by my brother Beck are strongly in favour of the view that, in such case, the Court should not, in the exercise of the discretion reposed in it by the terms of the injunction, award any damages for its issue.

I have already expressed the opinion in a former judgment herein that the action was improperly launched; and I, therefore, dissolved the injunction complained of, without reference to the merits. I think it is unnecessary to consider whether I was right in the conclusion I then reached. It is apparent that, if there was any impropriety in the form of the action, it was, at most, merely a slip in the office of the defendant's solicitors. The grounds upon which the defendant claimed to enjoin the plaintiff from dealing with the fund were shewn in the statement of claim, although it may be open to doubt whether they were properly pleaded.

If the Court should not, in the exercise of its discretion, award the plaintiff damages, if the action were properly launched, should it award them to her merely by reason of the slip referred to? I think not. That would be rather a heavy penalty for an error the curing of the like of which by the Courts without penalty is a matter of almost daily occurrence.

If the undertaking in the injunction had been merely to pay such damages as the plaintiff might sustain, without more, the plaintiff would undoubtedly be entitled to recover any damages she may have sustained; but, where it is left to the discretion of the Court to say whether the

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defendant ought to pay any, I think it should, in the exercise of that discretion, attach more importance to the circumstances of the case and the nature of the action than to defects in the proceedings in the latter.

The Court being divided, the appeal and cross-appeal were dismissed.

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## ALBERTA.

FEBRUARY 3RD, 1912.

SUPREME COURT EN BANC.

## WATEROUS ENGINE WORKS CO. v. KELLER.

*Trial—Finding of Jury—Answers to Questions—Inference that one Question was Intended to be Answered in Negative—Reasonable Evidence to Support Finding—Sale of Goods—Rejection after Trial—Finding of no Contract.*

The plaintiffs sued upon a promissory note for $600 given by the defendant for one of the instalments of the purchase-price of machinery sold to him by the plaintiffs. One of the defences was, that the defendant received the machinery on trial, and, having tried it, rejected it, and there was, therefore, never any contract or consideration for the note. The action was tried with a jury. Certain questions were submitted to the jury, the first two being: (1) Was there a contract to purchase between plaintiffs and defendant when notes were delivered by defendant to S. (the plaintiffs' agent)? (2) If not, was there a contract at any time? The trial Judge told the jury that, if they found that there was no contract, they need not answer the other questions. On the jury being asked for their verdict, the foreman answered that "there was no contract at the time the notes were delivered by the defendant." Before anything further was said, according to the statement in the appeal-book, counsel for the plaintiffs asked the Judge to refuse to accept that verdict, as unsupported by the evidence and perverse. The Judge did not accede to this request; and, no further objection being made, the jury was discharged, and judgment was given dismissing the action. The plaintiffs appealed; and in their notice of appeal the only ground raised was, that the verdict could not be supported by the evidence. In their factum it was stated that the jury answered the first two questions in the negative:—

*Held* (STUART, J., dissenting), that it should now be assumed that the jury intended to answer both questions in the negative. That was the opinion of both Judge and counsel; and it was possible that the error was in the appeal-book in not shewing the answer to the second question; but, if not, counsel did not point this out before the jury was discharged, when it could have been remedied, and had not relied in it since; and there was no room for doubt, on the evidence, that the jury would have answered the second question in the negative, if they had been required to answer it.

*Held*, also (STUART, J., dissenting), that the verdict of the jury that there was no contract was sufficiently supported by the evidence.

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**The defendant swore definitely to the facts alleged in his defence; and, although he was flatly contradicted by S., and although there were other circumstances in connection with his acts which one would not expect to find if his statements were true, yet it could not be said that reasonable men could not come to the conclusion the jury did.**

***Metropolitan R. W. Co.* v. *Wright*, 11 App. Cas. 152, followed.**

***Per* STUART, J.:—There was not a sufficient finding of fact by the jury upon which to base a judgment; and there should be a new trial, upon payment by the plaintiffs of the costs of the first trial and of the appeal.**

Appeal by the plaintiffs from the judgment of SIMMONS, J., upon the findings of a jury, dismissing the action, which was upon a promissory note.

The appeal was heard by HARVEY, C.J., SCOTT, STUART, and BECK, JJ.

O. M. Biggar, for the plaintiffs.

G H. Ross, for the defendant.

HARVEY, C.J.:—The plaintiff's claim is on a promissory note for $600 for one of the instalments of the purchase-price of some threshing machinery. One of the defences is, that the defendant received the machinery on trial, and, having tried it, rejected it, and there was, therefore never any contract or any consideration for the notes. The action was tried before my brother Simmons, with a jury. Certain questions, agreed upon by counsel, were submitted to the jury, the first two of which were:—

1. Was there a contract to purchase between plaintiff and defendant when notes were delivered by defendant to Mr. Switzer?

2. If not, was there a contract at any time?

The learned trial Judge, in his charge to the jury, directed them that, if they found there was no contract, they need not answer the other questions.

On the jury being asked for their verdict, the foreman answered: "That there was no contract at the time the notes were delivered by the defendant, so say we all." The appeal-book indicates that thereupon, before anything further was said, counsel for the plaintiff applied to the Judge to refuse to accept that verdict, as unsupported by the evidence and perverse. The Judge declined to accede to this request, stating that he had instructed the jury that, if they answered that question in the negative, no answer was required to the other questions. No further objection being

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made, the jury was discharged, and judgment was subsequently directed dismissing the action.

In the notice of appeal the only ground of appeal raised is, that the verdict cannot be supported by the evidence; and in the appellant's factum it is stated that the jury answered the first two questions in the negative. On the argument it was pointed out from the Bench that the second question did not appear to have been answered, and that the answer to the first question alone did not appear to be a sufficient finding of fact. No explanation was offered, but the point was not pressed by counsel.

In view of the circumstances, it appears to me that it should be now assumed that the jury intended to answer both questions in the negative. There is no doubt that that was the opinion of both Judge and counsel; and it is possible that the error is in the appeal-book in not shewing the answer to the second question; but, if not, counsel did not point this out before the jury was discharged, when it could have been remedied, and has not relied on it since; and there is no room for doubt, on the evidence, that the jury would have answered the second question in the negative, if they had been required to answer it.

The only question to consider, then, is, whether the verdict of the jury that there was no contract can be supported by the evidence. The learned Judge plainly intimated to the jury that his own view was against that conclusion, so that the possibility of their having been misled by anything he said in the defendant's favour is eliminated.

In Cox v. English Scottish and Australian Bank, [1905] A. C. 168, Lord Davey, in delivering the judgment of the Judicial Committee of the Privy Council, on p. 170, quotes Lord Selborne as enunciating the principle applicable to such cases in Metropolitan R. W. Co. v. Wright, 11 App. Cas. 152, as follows: "In many cases the principles on which new trials should be granted on the ground of difference of opinion which may exist as to the effect of the evidence have been considered, both in the House of Lords, and in the lower Courts, and I have always understood that it is not enough that the Judge who tried the case might have come to a different conclusion on the evidence than the jury, or that the Judges in the Court where the new trial is moved for might have come to a different conclusion; but there must be such a preponderance of evidence, assuming there is evidence on both sides to go to the jury,

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as to make it unreasonable, and almost perverse, that the jury, when instructed and assisted properly by the Judge, should return such a verdict."

Acting on that principle, it appears to me to be impossible to say that this verdict is one which should be set aside. The defendant swore definitely to the facts alleged in his defence; and, although he was flatly contradicted by Switzer, the plaintiff's agent, and although there were other circumstances in connection with his acts which one would not expect to find if his statements were true, yet it cannot be said that reasonable men could not come to the conclusion the jury did. And in Metropolitan R. W. Co. v. Wright, above mentioned, Lord Halsbury, at p. 156, says: "If reasonable men might find the verdict which has been found, I think no Court has jurisdiction to disturb a decision of fact which the law has confided to juries, not to Judges."

There is no question of misdirection or of the jury having possibly been misled or of improper or incomplete evidence, and there is no reason to suppose that a new trial would necessarily lead to any other result. It it did not, the plaintiff would then have as much right to ask for another trial, and we might have a chain of trials with no end in sight.

In my opinion, the appeal should be dismissed with costs.

SCOTT and BECK, JJ., concurred.

STUART, J. (dissenting):—The plaintiffs sue upon a promissory note given to them by the defendant for the sum of $600 and interest. The note is the first of a series of four, the remaining three being for $800 each, given in payment of the purchase-price of a steam engine, separator and attachments, which the plaintiffs allege were sold by them to the defendant.

The signing and delivery of the agreement and of the notes is not denied by the defendant, but he alleges that such delivery was merely to the plaintiffs' agent in escrow, and subject to the condition precedent that the machinery should, after a period of trial, do good work, in which case the documents were to be delivered to the plaintiffs by their agent; but that, if the machinery should fail to do good work, then they were to be redelivered to the defendant.

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The action was tried at Macleod by Mr. Justice Simmons and a jury. After consultation with counsel for both parties and with their assent, the learned Judge left the following questions to the jury:—

1. Was there a contract to purchase between the plaintiff and defendant when notes were delivered by defendant to Switzer (the agent)?

2. If not, was there a contract at any time?

3. If there was a contract, (a) was the machine according to the warranty, that is, as good as new; (b) was it capable of doing as good work as any of its size sold in Canada?

4. Was it reasonably fit for the purposes for which it was sold, viz., ploughing and threshing purposes?

5. If not, then how much less was it worth than the contract-price for such purposes?

Upon the return of the jury the following occurred:—

The Clerk: Gentlemen of the jury, have you decided on your verdict?

Foreman: We have.

Clerk: How do you find?

Foreman: That there was no contract at the time the notes were delivered by the defendant, so say we all.

Mr. Biggar (counsel for the plaintiffs): I was going to ask your Lordship whether you could possibly accept that verdict; it is obviously contrary to the evidence given on both sides.

His Lordship: It is in answer to the question, and I have instructed them that, if they answered that question in the negative, there was no answer required to the other questions. I hold that they have answered that in the negative.

Mr. Biggar: What I would suggest is this, my Lord, that there was clearly, upon the evidence of the defendant himself, a contract, and that the verdict is perverse.

His Lordship: I cannot accept that view of it. However, you will have a chance to argue that on motion for judgment.

Upon the subsequent motion by the defendant for judgment, the learned Judge dismissed the action with costs.

The evidence of the defendant in respect to the manner in which the contract was given was as follows: "I told him (Switzer) that I would sign the contract, and he was to hold it until the ten days was up, so I could prove the machine was satisfactory." And again: "Now, I said, 'You

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hold this contract until the ten days' guarantee is up, and then I will make settlement with the notes;' and he told me right there that, if that machine did not work satisfactory, to pull her out, but he didn't say where to pull her to . . . I took it to mean to quit it if it didn't work satisfactorily . . . I told him to hold the contract, and he says, 'I will,' and I said, 'I want you to hold it until the ten days' trial is up, and then I will make settlement about the notes;' and he says 'all right.' He says, 'if things are not all O.K. you will get your papers back.'"

This occurred on the 24th August, 1909, before the machine was delivered. After delivery of the machine, and (as the defendant says) on the first day of threshing with it (the second day according to Switzer), the defendant signed the notes referred to. The following is his account of how he came to do this: "That day, that was it, he came in and wanted me to make settlement, to sign up the notes. I said: 'Look here, I was to have 10 days.' He then shewed me on the contract that the purchaser should make settlement at delivery; he said he and his wife wanted to start for California, and he says: 'I would like to have you sign these notes up, and we will make this machine go. We have a man in Calgary named Oliver, he can do it with a pocket knife. He had been our engineer in Brantford, Ontario, for 8 or 12 years, and thoroughly understands this separator; we will send him down if she ain't right. Then she will go all right. I would like to go out this evening, and if you can sign these notes it will let me out.' I said, I supposed I was getting 10 days' trial on the machine. 'Well,' he says, 'so you are;' and I says, 'All right, I will hold the notes for 10 days, and if the machine does not give satisfaction, you are likely to have trouble in collecting the notes.' He says, 'The machine will give satisfaction.' He says, 'I will hold them until the guarantee is out;' so I said, 'If the machine works right, you will have no trouble in collecting the notes.' He says, 'I will do that, I will be glad to get off;' and I signed the notes; that was about 8 o'clock, it was after supper, and we talked there likely an hour about; and, as soon as I signed the notes, he put them in his pocket, and said he wanted to get off to Cayley to catch the morning train."

The agent of the plaintiffs, Switzer, denied, inferentially at least, that any condition was attached to the delivery of the contract and the notes. The plaintiffs rested simply on

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the warranty clause in the contract itself, which reads as follows:—

"The said machinery is sold upon and subject to the following mutual and interdependent conditions, namely:—

"It is warranted to be made of good material and durable with good care, and with proper usage and skilful management to do as good work as any of the same size sold in Canada. If the purchasers, after trial, cannot make it satisfy the above warranty, written notice shall, within ten days after starting, be given to the company at Winnipeg and the agent through whom purchased, stating wherein it fails to satisfy the warranty, and reasonable time shall be given to the company to remedy the difficulty, the purchasers rendering necessary and friendly assistance, together with requisite men and horses; the company reserving the right to replace any defective part or parts; and, if then the machinery, or any of them, cannot be made to satisfy the warranty, it is to be returned by the purchaser, free of charge, to the place where received, and another substituted therefor that shall satisfy the warranty, or the money and notes immediately returned and this contract cancelled; neither party in such case to have or make any claim against the other. And, if no such notice is given within such time, that shall be conclusive evidence that said machinery is as warranted under this agreement, and that the machinery is satisfactory to the purchasers. If the company shall, at purchaser's request, render assistance of any kind in operating said machinery or any part thereof, or in remedying any defects, such assistance shall in no case be deemed a waiver of any term or provision of this agreement, or excuse for any failure of the purchaser to fully keep and perform the conditions of this warranty. When, at the request of the purchaser, a man is sent to operate the above machinery, which is found to have been carelessly or improperly handled, said company putting same in working order again, the expense incurred by the company shall be paid by said purchaser. It is also agreed that the purchaser will employ a competent man to operate said machinery. This warranty does not apply to second-hand machinery.

"There are no other warranties or guarantees, promises or agreements, than those contained herein."

According to the evidence of the defendant, the machine was started without grain on Monday the 13th September, and actual threshing began on Tuesday the 14th, and con-

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tinued with some interruptions until the 23rd. Both Switzer and Oliver, an expert of the plaintiffs, were in attendance on the machine during a portion of this time, and swore that it worked fairly well. The defendant and a number of men who were working at the machine swore that it worked very unsatisfactorily. On the 23rd September, the defendant wrote the following letter to the plaintiffs:—

"Sept. 23rd, 1909.

"Waterous Engine Company, Winnipeg.

"Dear Sir: As I have served about the limit of time trying to get the McCloskey separator to work, and have failed to do so, will notify you and am sending Mr. Switzer word to Wetaskiwin. When I bought this rig, I was supposed to get a rig that had only been run seven days last season, but I find this rig has run one full season, and, as your agent has knocked me out of several hundred dollars, I have pulled the outfit out and paid my men off and am not going to take it; this is an old burned up outfit, and not the new rig I was supposed to get from Switzer; it has never given a day's satisfaction since it landed on the ranch. You will hear from Mr. Forsyth, my solicitor, later from High River.

"Yours truly,

"E. A. Keller, Cayley."

A few days later, Switzer came to the defendant's place with another expert, and said he was prepared to make the machine work properly, but the defendant refused to have anything more to do with it.

The learned trial Judge said in his charge to the jury: "The plaintiffs say they sold the machine in the ordinary way, with this exception, that it was a second-hand machine; that they provided for that in the contract, but guaranteed it to be in as good working order as new; and the defendant signed this contract; then, when the same had been submitted to the company at Winnipeg and approved, on the request of the plaintiffs' agent, Mr. Switzer, he apparently completed the transaction by executing the notes which the contract says he should execute, and which shall be taken as evidence of acceptance of the machine. The defendant now says that was not the arrangement; he says that the arrangement between the parties was, that there would be no contract to purchase until he had had 10 days' trial of the machine, and then he should have the privilege of getting back



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his notes if not suited with the machine. Thus you will have to decide practically between his evidence and that of Mr. Switzer as to the truth or untruth of that contention. If that contention were true, there was no contract between these parties at all, no purchase of the machine, unless he afterwards certified his acceptance in the way he says it was intended. Now, when the parties set up a contention like that, after executing a contract, delivered it to the other party, and then executed notes, signed notes, which the contract contemplated, you are bound to examine very closely a contention of that kind, because that is not the way in which ordinary business men conduct their business. My opinion is not binding on you; I am simply expressing my opinion there. You will have to find first which is the proper construction to put on the deal between these parties. Was there an agreement to purchase that machine as evidenced by the contract and notes, or an arrangement to purchase after something was done? The ordinary business man does not sign notes in that way and deliver them in escrow, as you know, and you must take that into consideration. And, further, it does not seem that there is any evidence that he demanded the return of the notes which an ordinary business man might do; that is an inference which I would draw which is not binding upon you. You will have to find whether his contention is the actual one, or whether the statement of Mr. Switzer is a statement of the actual dealings between these men, with this view that you have the contract and notes as supporting the contention of Mr. Switzer. Now, I have observed, if you hold that there is no contract, that these notes were delivered on the condition or in escrow, then you do not need to answer any more of the questions; but, if you draw the same inference that I would draw, that there was a contract, then you must deal with the other questions."

The plaintiffs now move to set aside the verdict and for a new trial, and in their notice of appeal they give the following main grounds:—

(2) That, the defendant having given evidence of the contract between himself and the plaintiffs, and having shewn that he did not comply with the conditions of the warranty therein contained, a verdict should have been directed or judgment entered for the plaintiffs.

(3) That the said verdict of the jury was perverse and contrary to the uncontradicted evidence.

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It is undoubtedly the case that, although counsel for both parties seem to have assented to the form of the questions to be put to the jury, the exact wording of them turns out to be rather unfortunate.

The first question was, no doubt, intended to cover the defendant's contention that he delivered both contract and notes in escrow or upon a condition precedent; that, in fact, it was agreed that there should be no binding contract of purchase until the trial had proved satisfactory. At first the question would appear sufficient, but the point seems to have been overlooked that a contract with a condition precedent is still in one sense a contract. It is an agreement that, if an event happens, then there shall be a contract. It is in this sense that counsel for the plaintiffs, immediately after the verdict and again upon appeal, contended that the verdict of the jury, their answer to the first question, to the effect that there was no contract at all at the time of the delivery of the notes, was perverse. There can, of course, be no question, upon the evidence, but that this contention is correct. But I am not sure that the jury were to blame for this. Neither in the form in which the first question was submitted to them, nor in the Judge's charge (I cannot speak of the addresses of counsel, for these are not before us), was this distinction, this exact point, brought to their attention. And yet the first question must have been intended as an inquiry whether the delivery of the contract and the notes was or was not purely conditional upon the machinery proving satisfactory. Otherwise it is difficult to understand the purpose of the second question. Obviously, the second question was meant as an inquiry whether the machinery did in fact work satisfactorily, i.e., whether the condition impliedly referred to in the first question had been fulfilled or not. If the first question was really meant to ask whether a contract finally binding had been made at the time of the delivery of the notes, then a negative answer would not necessarily determine it in the defendant's favour. A negative answer to the second question was also clearly needed before the defendant could be said to have succeeded. It dos not very clearly appear from the Judge's charge that the jury were told very definitely that they need only answer the first question, if their answer to it was in the negative, although from what occurred after the verdict was given, from what passed then between counsel and the Court, it is clear that both Court and counsel then understood that

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the negative answer given to the first question did in fact settle the matter in the defendant's favour. Yet it is clear that it did not so settle it, unless we take the answer to mean that there was not even a conditional contract made, in which sense, of course, the answer was obviously perverse and repugnant to the defendant's own evidence. It is difficult to understand why counsel for the plaintiff did not insist on an answer to the second question, as well as the first, unless the first question was really understood to be an inquiry into something which was not really in dispute at all, viz., whether the defendant had or had not agreed, even conditionally, to buy the machinery; in which latter case it is difficult to see why the question was, apparently with the plaintiffs' consent, framed in the way it was framed. I notice that one of the jurymen took part in the examination of Switzer as follows:—

"Q. I would like to ask you if, at the time that you went there with this company's expert, and Mr. Keller refused to get the help for you to try the machine, was that after the 10 days' trial was up? A. No, it had been 10 days after he started the machine, it was more than 10 days.

"Q. As I understand it then, when this company's expert arrived, Mr. Keller's time of trial had expired? No answer.

"Q. At the time you came with this company's expert and Mr. Keller refused to help, was not his time of trial expired? A. Well, it was more than 10 days from the time he had started the machine."

Noticing this and reading the Judge's charge, I am very strongly of the opinion that the jury must have understood the first question to be, whether or not, at the date of the delivery of the notes, there was an absolute final contract or not, and that what they meant by their negative answer was, that they found that the defendant's story was true and that he only agreed to buy on the condition that the machine did good work. Why a negative answer to this was treated as settling the matter, I am unable to understand. I notice that in the plaintiffs' factum it is said that the two first questions were answered in the negative. This suggests the question whether all parties at the trial did not look upon the two first questions as really one question in two parts. Yet the answer says there was no contract "at the time of the delivery of the notes."

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I do not see any advantage in endeavouring to explain how such a misunderstanding of the position arose. It is sufficient to point out that, taking the first question in the sense which must have been attached to it by every one at the time, and taking the only answer given by the jury, with the ordinary meaning that its words must bear, there was certainly not a sufficient finding of fact made by the jury to base a judgment upon. The law is clear that there may be a contract to sell goods conditional upon their proving satisfactory to the purchaser. It was in order to apply this law that the second question was asked. And it was not answered. Upon that second question the jury should, I think, have had some direction upon the law as to whether, if they found the facts to be so and so, the defendant had a right to reject arbitrarily, to express dissatisfaction arbitrarily, or whether, if the machine did in fact work with reasonable satisfaction, a contract should not then be held to have been concluded, and also upon the point whether the defendant was or was not bound, assuming his version of the affair to be correct, to return the machine to the plaintiffs, and, in the absence of his doing so, whether he should or should not be held to have accepted it, notwithstanding his letter of rejection.

This being so, I do not think a judgment founded merely upon the answer given to the first question ought to stand.

The only question is, whether there should be a new trial, or whether this Court, sitting in appeal, has not power to deal with the case and find the facts itself.

Rule 507 of the Judicature Ordinance says in part: "On appeal . . . the Court shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been made and to make such further or other order as the case may require." This is taken from the English Order LVIII., Rule 4, which refers to the power of the Court of Appeal in England. The meaning of this Rule has been much discussed. The latest decision is that of the House of Lords in Paquin Limited v. Beauclerk, [1906] A. C. 148. In that case, at p. 160 of the report, Lord Loreburn, L.C., said: "The proper construction of Order LVIII., Rule 4, had been the subject of criticism in Millar v. Toulmin, 17 Q. B. D. 603, 12 App. Cas. 746, and Allcock v. Hall, [1891] 1 Q. B. 444. In the latter case all the Judges of the Court of Appeal concurred

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in the opinion that they were at liberty to draw inferences of fact and enter a judgment in cases where no jury could properly find a different verdict. Obviously the Court of Appeal is not at liberty to usurp the province of a jury; yet, if the evidence be such that only one conclusion can properly be drawn, I agree that the Court may enter judgment. The distinction between cases where there is no evidence and those where there is some evidence, though not enough properly to be acted upon by a jury, is a fine distinction, and the power is not unattended by danger. But, if cautiously exercised, it cannot fail to be of value."

It is clear from this decision, and from the expression of opinion in Allcock v. Hall to which the Lord Chancellor refers, that we have no need to consider whether Order XL., Rule 10, is in force here. Our own Rule 507 gives all the power given by Order XL., Rule 10, and more. It covers the whole field and is the only Rule to be considered.

Now, if the appellants had asked for judgment, or, in the alternative, for a new trial, we should have had to consider whether any jury could, upon the evidence, reasonably give a verdict for the defendant; and, if we were of opinion that they could not, I think we could have entered judgment for the plaintiffs ourselves, though we should also have to determine the question of the defendant's claim for damages. But, as the appellants have not asked for judgment, and the matter was not argued on that ground, it is useless even to consider the case from that point of view.

On the other hand, the defendant opposes the motion for a new trial, and asks that the judgment dismissing the action be not disturbed. There is no doubt that, under the decisions quoted, we have power to consider whether any jury could reasonably give a verdict for the plaintiffs.

Upon almost every point in the case there is conflicting evidence. It is true that, as the trial Judge said to the jury, the evidence is strongly in favour of the defendant as to the working of the machine; but that, I think, is not sufficient to justify us in taking the matter in our own hands.

Even if we were bound to accept the jury's finding upon the first question and make no inquiry for ourselves at all upon the point involved in it, I do not think we ought simply to weigh the evidence referable to the second question and say that, because it points strongly to the conclusion that the machine did not work satisfactorily, therefore no rea-

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sonable jury could come to any other conclusion. There may be no doubt—indeed, I have no doubt at all—as to what the jury, who did answer the first question, would have answered to the second. But another jury might possibly take another view, and I cannot say that they would be unreasonable if they did so.

Whether the machine worked in fact with reasonable satisfaction was a question upon which the verdict of the jury should, I think, have been taken. See Parsons v. Sexton, 16 L. J. C. P. 181; Dallman v. King, 7 L. J. C. P. 6.

Moreover, where it is clear that the jury has not found sufficient facts to base a verdict upon, I think it is open to the Court to question the one finding that was made, and on a new trial the whole case would be re-opened. It is quite possible, in view of the peculiar form of the defendant's story, and its obvious inconsistency with the written agreement, that another jury might come to an entirely different conclusion, even upon the first question. Indeed, the same questions would not probably be asked. At least the first one should, as I have indicated, be modified so as to make its meaning more clear.

Ordinarily, these reasons should be quite sufficient to justify the Court in ordering a new trial. The difficulty which, in the opinion of the other members of the Court, stands in the way of the appellants, is, that it was assumed at the trial that a negative answer to the second question had been given; that their counsel did not insist on an answer; that in their factum they make the same assumption; that in their notice of appeal they do not raise the point, and did not do so on the argument. Notwithstanding all this, the fact remains that there is really no finding by the jury upon which a final verdict for the defendant can properly rest. I think that real justice would be done rather by ordering a new trial, upon the condition that the plaintiffs pay the costs of the first trial and of the appeal.

*Appeal dismissed;* STUART, J., *dissenting.*

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## ALBERTA.

FEBRUARY 3RD, 1912.

SUPREME COURT EN BANC.

## RICHARD BELIVEAU CO. v. MILLER.

*Assignments and Preferences—Agreement for Sale and Subsequent Transfer of Land — Trust — Preference—Subsequent Transactions—Mortgages—Validity — Attack by Creditors — Assignments Act — Statute of Elizabeth—Parties—Accounting—Equitable Execution.*

*Held*, reversing the judgment of STUART, J., 16 W. L. R. 460, that the transaction in question was an honest one, even on the part of I., the grantor; he had no intent to defraud his creditors; he had an intent to delay them, but that intent was not fraudulent.

The Statute of Elizabeth does not prevent a debtor giving a preference to one creditor over another with a deliberate intent of so doing, and with the necessary result that the unpreferred creditors are hindered and delayed.

*Mulcahy* v. *Archibald*, 28 S. C. R. 523, followed.

*Held*, therefore, that the transaction attacked by the plaintiffs was valid.

*Held*, however, that the plaintiffs, being judgment creditors, were entitled to relief by way of equitable execution, so as to reach, in the defendants' hands, all the property or money of I. that remained after the defendants' own claim was satisfied; and for this purpose I. was not a necessary party to the action. The fact that the defendants had not realised upon certain substituted properties, which came to their hands as security for part of their claim, was no obstacle to giving effect to the demand for equitable execution.

Special order as to costs.

Appeal by the plaintiffs from the judgment of STUART, J., 16 W. L. R. 460.

The appeal was heard by HARVEY, C.J., SCOTT, BECK, and SIMMONS, JJ.

O. M. Biggar, for the plaintiffs.

H. H. Parlee, for the defendants.

The judgment of the Court was delivered by

BECK, J.:—This is an appeal from the judgment of Stuart, J., dismissing the plaintiffs' action—one to declare void certain transactions of one Irwin, of whom the plaintiffs are creditors.

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In September, 1905, Irwin purchased, under agreement with Mackenze Mann & Co. Limited, lots 20, 21, and 22, block 1, Lloydminster, and shortly afterwards put up an hotel known as "The Alberta Hotel" upon lots 21 and 22. Soon after, he became indebted to the defendants, as a firm of Miller & Robinson, to the extent of $2,000, and to a firm of Miller Bros., of which the defendant Miller was a member, to the extent of $4,000, and also to other persons in sums aggregating a large amount.

About April, 1906, in consequence of his being unable to meet his obligations to his creditors, conferences took place between Irwin and the defendants—chiefly with Robinson; these conferences continued from time to time, with the result that, some time during the course of the summer of 1906, Irwin, with the assistance of Robinson, prepared a statement of his assets and liabilities, shewing assets, composed very largely of the hotel and furnishings, to the amount of $30,685, and liabilities to the amount of $16,450, thus shewing an apparent surplus of about $14,000, and an indebtedness to creditors other than Miller & Robinson and Miller Bros., for whom throughout the transactions in question one or other of the defendants was acting, of $10,450.

In September, 1906, the conferences between Irwin and the defendants resulted in the defendants agreeing to advance Irwin $6,000 to enable him to reduce his liabilities to his creditors other than Miller & Robinson and Miller Bros., and which, if so applied, would reduce those liabilities to $4,500; and in Irwin agreeing to give security to Miller & Robinson for $12,000, made up of the advance of $6,000 and the indebtedness of Irwin to Miller & Robinson of $2,000 and to Miller Bros. of $4,000.

Some time before this, Irwin had paid the balance of the purchase-price for lots 21 and 22, and had thereby become entitled to a transfer of them. The evidence satisfies me that this arrangement was an entirely honest one on the part both of Irwin and the defendants. The Assignments Act (ch. 6 of 1907, assented to on the 15th March, 1907) had not then been passed. The law of the province as it then stood did not prevent preference being given by a debtor to one creditor over another by way of security upon real estate. The arrangement, so far as it provided for securing the indebtedness of Irwin to Miller & Robinson and Miller Bros., was, therefore, unobjectionable. It is obvious, also, that the proposal that Miller & Robinson should ad-

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vance $6,000 to Irwin for the purpose of enabling him to pay it to his creditors, and that Miller & Robinson should have security for that advance, was also unobjectionable. The plaintiffs, however, contend that the whole arrangement is vitiated because of what occurred when it came to be carried out. What took place was this. Miller & Robinson proposed, or rather, I fancy, assumed, that the transaction would be carried out by Irwin giving them a mortgage upon the hotel property for $12,000. Irwin, however, proposed that he should give Miller & Robinson a transfer by way of security, instead of a mortgage. He tells his reason as follows: "I wanted to give them a bill (agreement) of sale so I could be protected from the other creditors. I was badly tied up with the creditors, and I wanted to pay them off. They were bothering me for money, and Miller & Robinson had always been good friends to me, and I don't know whether I made the suggestion or they did; but, in talking over the matter, we came to the conclusion that we would make an absolute bill (agreement) of sale of the property to Miller & Robinson—so that I could say to my creditors that I had made a sale of the hotel. The verbal understanding I had with Miller & Robinson was that, as soon as I had paid off their indebtedness first, the property would revest to me, and I intended that way to make the creditors wait until I was in a position to pay them. My intentions at all times were to pay every one. . . . I thought by time I could pay them off."

Robinson says: "I was pushing him for money or for security different times during the summer. I wanted a mortgage on it, and he refused to let a mortgage go on, because it would get out to his creditors, but he thought that, when he had his house (hotel) completed, he could raise money enough on it, and at one time I offered him the privilege of raising the money and buying off his creditors, and I would take a second mortgage on it for our account."

Robinson tells of this becoming impracticable, and then says: "We finally compromised on (the advance of) $6,000."

"Q. Now, will you tell me under what circumstances and why an agreement for sale was taken, instead of a mortgage? A. Because I thought it was equally good security as a mortgage, and for no other reason, but I think Irwin, if I remember right, when he found out he couldn't get money enough to pay them all off, Irwin then wanted to gave an agreement for sale instead of a mortgage.

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"Q. Why? A. Because he said those he didn't pay off were likely to jump on him and close him out. That was the reason that he didn't want to give a mortgage; he wanted to give the agreement for sale instead.

"Q. Well, why did you advance him the $6,000? A. In order to get security for the balances we had; for the $4,000 that Miller had; a security also for the $2,000 we had in the building, without closing him out.

"Q. Now, Mr. Irwin on the stand has said in effect that this was a collusion between you and him, whereby the creditors were to be defrauded or delayed. What have you to say to that? A. Well, we had no money except what was engaged in the business. We had to pledge our credit to the utmost to get it, and would we be likely to enter into any collusion to hurt ourselves, when we were pledging everything we had to get the money to give him?

"Q. Well, now, that is all right in a way, but was there any collusion? A. Absolutely none at any time."

Miller's evidence is to the same effect.

Furthermore, I think that counsel for the defendants, in putting his question to Robinson as to collusion, did so more strongly than Irwin's evidence justifies. Irwin does not say there was collusion. He states the reason he had for insisting that Miller & Robinson should, for the purpose of carrying out the arrangement they had come to, take security in the form of an agreement for sale instead of a mortgage, namely, that while he intended to pay the $6,000 proposed to be advanced, to his other creditors, and expected shortly to be able to pay and intended to pay them in full, he would be enabled to do so without being harassed by these creditors in the meantime. I think there was no direct intent on the part of the defendants to prejudice the creditors in any way. Their intention was to get security for their claim of $6,000. They could get this only on such terms as Irwin would agree to, namely, the advance of a further sum of $6,000 and the taking of a security in the form of an absolute agreement for sale. Their agreeing to take security in this form, notwithstanding that they knew Irwin's reason for its being in that form, did not, it seems to me, make them parties to Irwin's intent to prejudice his creditors. Their primary and prevailing intent was to get security. If the other creditors were to be delayed, that delay was merely the effect of the realising of their real intent. The statute 13 Eliz. does not void a transaction which merely has the effect of delay-

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ing hindering, or defrauding creditors. The transaction was entirely honest, I think, too, even on the part of Irwin. He had no intent to defraud his creditors. He had, it is true, an intent to delay them, but that intent was not fraudulent.

It was long ago settled that the Statute of Elizabeth does not prevent a debtor giving a preference to one creditor over another with the deliberate intent of so doing, and with the necessary result that the unpreferred creditors are hindered and delayed. The honest intent to do the lawful act of giving security to one creditor does not cease to be honest because the necessary consequence is foreseen, namely, that other creditors will be hindered and delayed, and must, therefore, be secondarily intended.

In Mulcahy v. Archibald, 28 S. C. R. 423, it is said (p. 529): "The Statute of Elizabeth, while making void transfers, the object of which is to defeat or delay creditors, does not make void but expressly protects them in the interest of transferees who have given valuable consideration therefor, and it has been decided over and over again that knowledge on the part of such a transferee of the motive or design of the transferor is not conclusive of bad faith or will not preclude him from obtaining the benefit of his security. So long as there is an existing debt and the transfer to him is made for the purpose of securing that debt and he does not either directly or indirectly make himself an instrument for the purpose of subsequently benefitting the transferor, he is protected and the transaction cannot be held void. As Jessel, M.R., said in Middleton v. Pollock, 2 Ch. D. 104, at p. 108: 'It has been decided, if decision were wanted, that a payment is bona fide within the meaning of the statute of Elizabeth, although the man who made the payment was insolvent at the time to his own knowledge, and even although the creditors who accepted the money knew it. . . The meaning of the statute is that the debtor must not retain a benefit for himself.'"

Going one step further, it is a common and lawful mode of giving security to give a conveyance absolute in form. If it is honestly given, the fact that that particular form may have the effect of hindering and delaying other creditors does not necessarily modify the primary honesty, though it may, of course, constitute a circumstance from which fraud may be inferred. It is, however, quite clear that, though this form of security was adopted, there was no in-

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tent, even on Irwin's part, to retain ultimately, or even indefinitely, any interest in the property to the prejudice of his creditors.

The onus is on the attacking party to prove the common intent. The evidence, some of which I have quoted, shews that the defendants were pressing for security; that they were willing to accept a mortgage; that Irwin was not willing to give security in that form, but wished to give it by way of an agreement for sale. The defendants certainly had a right to take the security in any form in which they could get it, whether or not the probable or necessary effect would be to hinder or delay other creditors.

I, therefore, hold the transaction attacked by the plaintiffs to be valid. It seems to me wholly unnecessary to enter into a discussion of the details of the transaction. Once that form of security was agreed upon, it was necessary that certain fictitious statements should be made in the document embodying it, and that certain fictitious relationships should be constituted.

For the reasons indicated, I hold that the plaintiffs cannot succeed upon that branch of the case which attacks the transaction in question as fraudulent.

The plaintiffs, however, state a case for equitable execution. The learned trial Judge has set out at length the sundry subsequent dealings with the property conveyed to the defendants by way of security; and, in my opinion, the plaintiffs, being judgment creditors, are entitled to such order and directions from this Court as will enable them to reach, in the defendants' hands, all the property or money of Irwin that remains after their own claim is satisfied. For this purpose, Irwin is not a necessary party to the action. The fact that the defendants have not yet realised upon certain substituted properties, which came to their hands as security for part of their claim, can be no obstacle to giving effect to the claim for equitable execution. Some of the lands now in the hands of the defendants, being part of the proceeds of the original land, are within the jurisdiction of this Court; some are not. This Court can act directly upon the former, and, if necessary indirectly upon the residue, by process against the defendants—these latter properties necessarily forming items in an account which this Court can properly direct.

I think the order of this Court should be, that an account be taken of the amount owing to the defendants,

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including the amount owing to Miller Bros.; an account of what property they received by way of security, and what disposition was made of it, and what their present securities consist of, their respective purchases of certain property which came to their hands by way of substituted security being declared ineffective to vest in them absolute title. I would reserve the further consideration of the action until the account has been taken.

I would allow the defendants their costs below and their costs of this appeal, not directly against the plaintiffs, but to be added to their claim, and as a charge against the security in their hands. I would allow the plaintiffs their costs of appeal as a second charge upon the property after the satisfaction of the defendants' claim and costs. As the plaintiffs failed to establish fraud, I would allow them no costs up to the giving of judgment in the Court below. The costs of the reference I would reserve. The defendants are ready and willing to give an account. If they do so promptly, completely, and particularly, the costs of the reference should be quite small.

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## ALBERTA.

FEBRUARY 3RD, 1912.

SUPREME COURT EN BANC.

## DUGGAN v. WADLEIGH.

*Mortgage—Duress—Title to Land—Vendor and Purchaser—Subpurchaser—Indemnity—Costs—Reference.*

The defendant R. was the owner of certain lots which in 1906 he agreed to sell to M. A few months later, M. entered into an agreement with the defendant W. to sell him these lots at an increased price, W. agreeing to make the payments to R. according to the terms of R.'s agreement with M. W. entered into agreements with various persons for the sale of different lots, and the plaintiff became the purchaser of one lot. W. thereafter became in default in his payments to R., which fact became known to his subpurchasers. Meetings were held and arrangements made, in pursuance of which, on the 28th March, 1908, R. released M. and took W. in substitution; and W. authorised and requested R. to collect the moneys unpaid on the agreements, including that from the plaintiff, and to credit the amounts received on his (W.'s) indebtedness to R., and to give title when the balance was paid, at his (R.'s) discretion and on such terms as he thought best. Afterwards R. told the plaintiff that he was not bound to give title to any of the purchasers from W., but that he would give title to the plaintiff upon payment of $200 in

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**addition to the amount remaining unpaid on the agreement. In consequence of this, the plaintiff paid R. the amount due according to the original agreement between the plaintiff and W., received a transfer, and made a mortgage to R. for $200, which was registered against the plaintiff's title:—**

***Held*** **(SCOTT, J., dissenting), that the mortgage was not obtained by duress; the plaintiff was not required to give it unless he preferred to do it in order to get the title which R. was not bound to convey to him. But W. was bound to see that the plaintiff got title on payment of the purchase-money according to his agreement; and, as he authorised and directed the money to be paid to R., he (W.) should be required to indemnify the plaintiff against any further expense he was put to to obtain what he was entitled to call on W. to furnish—but this indemnity should extend only to the mortgage and not to the costs of the plaintiff incurred by reason of his claim for cancellation of the mortgage and R.'s counterclaim upon the mortgage, upon which R. was entitled to succeed.**

***Per*** **SCOTT, J., that the plaintiff was entitled, if he desired it, to a reference for the purpose of ascertaining whether R. had received payment or settlement in full for the lots sold by him to M.; and, if it should appear that he had, the $200 mortgage given by the plaintiff should be cancelled.**

Appeal by the defendants from the judgment of TAYLOR, DIST.CT.J., in favour of the plaintiff in an action for cancellation of a mortgage and indemnity therefrom.

The appeal was heard by HARVEY, C.J., SCOTT, STUART, and SIMMONS, JJ.

C. C. McCaul, K.C., and F. C. Jamieson, for the defendant Rankin.

H. A. Mackie, for the defendant Wadleigh.

H. H. Parlee, for the plaintiff.

HARVEY, C.J.:—The defendant Rankin was the owner of certain lots which in 1906 he agreed to sell to one Magrath. A few months later, the said Magrath entered into an agreement with the defendant Wadleigh to sell him these lots at an increased price, the purchaser agreeing to make the payments to the vendor Rankin according to the terms of his agreement with Magrath. The defendant Wadleigh entered into agreements with various persons for sale of different lots comprising a part of the lots sold to him, the plaintiff being the purchaser of one lot. Wadleigh thereafter became in default in his payments, which fact becoming known to his subpurchasers, and they becoming alarmed, a meeting was called for the purpose of taking steps to protect their interests. The plaintiff and the defendant Rankin were both present at the meeting, which was held in January, 1908. A second meeting was held a few weeks after, at which certain arrangements were made. In pursuance of

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these and other arrangements, the defendant Rankin formally released Magrath and took Wadleigh in substitution, and on the same day, viz., the 28th March, 1908, Wadleigh, through his attorney, by letter authorised and requested Rankin to collect the moneys unpaid on the said agreements, including the one from the plaintiff, and to credit the amounts received on his indebtedness to Rankin, at the same time requesting him to give title when the balance was paid, at his discretion and on such terms as he thought best.

The plaintiff was not present at the second meeting referred to, but he says he learned in February that the position the defendant Rankin had taken was, that he was not bound to give title to any of the purchasers from Wadleigh, but that he would agree to do so, if paid, in addition to the amount remaining unpaid on the agreements, the sum of $200 in respect of certain of the lots, of which the plaintiff's was one, and $100 in respect of the others. Shortly after this, the plaintiff had an interview with the defendant Rankin, when Rankin told him the same thing, and also that he would be losing money otherwise. Other interviews took place, in which the plaintiff endeavoured to get title without paying this $200, but without further success than an offer to take a mortgage for $200 on the lot, instead of cash.

No effort was made, apparently, to collect from the plaintiff the balance on his agreement, and at one of the interviews, the plaintiff says, after threatening that, if the subpurchasers did not comply with his terms, he would have to take proceedings against Wadleigh on his agreement, and they would all be foreclosed, Rankin said "that, as soon as his suit came off with Mr. Wadleigh, Mr. Wadleigh would be compelled to see the thing all right, to see us fellows through, that I needn't worry or think any more about it."

The plaintiff also says that Rankin told him, if he didn't want to pay, he had better see a solicitor, and that he did see Mr. Wadleigh's solicitor, who told him the matter was out of his hands, but he saw no other solicitor about the matter other than Rankin's solicitor, when he paid the balance and gave the mortgage. After some months, on the 8th July, 1908, the plaintiff, having decided to give the mortgage, went to Rankin's solicitor, told him he had come to give the mortgage, gave him instructions for it, and after it was prepared executed it and paid up on the agreement. A transfer to the plaintiff was given and registered, and the mortgage registered against the plaintiff's title.

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The plaintiff alleges, by his statement of claim, that the mortgage was obtained by duress, and claims damages, indemnity from the defendant Wadleigh, and cancellation of the mortgage. The action was tried before His Honour Judge Taylor, who gave judgment for the plaintiff, both for indemnity and for cancellation. The defendant Rankin appeals from this judgment, and the defendant Wadleigh, though not appearing as an appellant by the appeal-book, by consent also appeals.

In Rankin v. Wadleigh, 2 Alta. L. R. 469, an action between these two defendants, to which the learned trial Judge refers, Mr. Justice Beck expressed the opinion that the additional payments made by Wadleigh's subpurchasers to Rankin were involuntary and could be recovered back. It must be observed, however, that what was before Mr. Justice Beck was simply the pleadings in that action. He had no evidence of the facts, and the report leads to the inference that the learned Judge's conclusion was, that Rankin, after receiving the balance of the purchase-money, refused to convey without a further payment, and that, having taken the benefit of the agreements, he was bound to give effect to them; whereas the evidence in the present case shews that, before Rankin received any money under the agreements, there was an arrangement, or at least an understanding, with the purchasers, that he would convey only on being paid the additional sum demanded. There seems no doubt that the purchasers had no direct claim on Rankin under their agreements with Wadleigh, and he appears to have been very careful to avoid giving them any such claim, except on the terms which he was willing to grant. The plaintiff was not required to give this mortgage unless he preferred to do it in order to get the title which Rankin was not bound to convey to him. Wadleigh, however, was bound to see that he got title, on payment of the purchase-money according to the terms of the agreement; and, as he authorised and directed the money to be paid to Rankin, he should be required to indemnify the plaintiff against any further expense he was put to to obtain what he was entitled to call on Wadleigh to furnish him. The questions of the accounting between Rankin and Wadleigh and the plaintiff's interest in it do not arise and cannot be dealt with here. This indemnity, however, only goes to the extent of the mortgage, and cannot include the costs of either the claim against Rankin, which



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is wrong, or the claim on the mortgage, the necessity for which the plaintiff should have prevented by payment.

The claim for judgment on the mortgage is set up by counterclaim. There is no formal judgment in the appeal-book, though one is indexed, but the counterclaim naturally failed under the judgment given. As, however, the mortgage is a good and valid security, and is in default, the defendant Rankin is entitled to succeed on his claim to enforce it.

In the result, the appeal of the defendant Rankin should be allowed with costs, except the costs of the appeal-book, which is no credit to the solicitors who filed it; and the appeal of the defendant Wadleigh dismissed with costs; and there should be judgment in the Court below dismissing the plaintiff's action against the defendant Rankin with costs and in the plaintiff's favour against the defendant Wadleigh for indemnity as above-mentioned, with such costs as are properly apportionable to that portion of the action. On the counterclaim, there should be judgment for the defendant Rankin for the amount of the mortgage and for sale on default, in the usual terms, with costs.

SIMMONS, J., agreed with HARVEY, C.J.

STUART, J.:—With great respect to the opinion of the learned District Court Judge who tried this case, I am of opinion that this appeal must be allowed. The idea which seems to underlie both the judgment appealed from and the statement of claim in the action itself seems to me to be one of the lamentable results of an utterly vicious tenderness which is abroad in the land, and has, I regret to see, crept into the Courts, not towards ordinary purchasers of property who buy it to use it, but towards speculating subpurchasers and sub-subpurchasers who are caught in the contagion of real estate frenzy and buy a lot or two from somebody without knowing whether he owns it or not or can ever give title to it or not. The present plaintiff admits that for fourteen months after he had made his agreement with Wadleigh, and after he had paid over $500 to Wadleigh, it never struck him to inquire whether Wadleigh had title to the property or not. If he had gone to the land titles office in the first place, as it appears he very easily did on his own account in the end, he would have saved himself all his troubles and his $500 as well.

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This case is a very good example of the utterly perverted ideas as to right and wrong, which are entertained by people who go into speculation of this kind. The plaintiff, in his evidence in numerous places, seems to imagine that he had some real complaint against Rankin, with whom he had never had any business relations whatever. However unjustly Wadleigh may have treated the plaintiff, it is difficult to see why Wadleigh's sins should be thrown upon Rankin.

The simple question involved in the case is, whether, if A. agrees to sell an estate to B. and B. agrees to sell part of it to C., and if then B. assigns to A. the debt which is owing to him, B., from C., does that put C. in a position to sue A. for specific performance? It seems to me that it is impossible to contend anything of the kind. Even if we were to admit, which is very doubtful, that the letter principally in question here constituted an assignment of Duggan's debt to Wadleigh by Wadleigh to Rankin—I cannot understand how that could be said to have given Duggan a right to sue Rankin for specific performance of his, namely, Duggan's, contract with Wadleigh. I am quite ready to admit that, if Rankin had taken money from Duggan which he knew to be part of the purchase-price of some property which Duggan owed to Wadleigh, and knew at the same time that Wadleigh was unable to give title, then Duggan would undoubtedly have some equitable right against Rankin; but the evidence of the plaintiff himself is clear that Rankin refused to take his money. Duggan himself says: "I asked him. I was prepared to meet all my payments now. I asked him if he would not. He said, 'No, I can't do it, I am out of pocket now,' he says, 'on this.'" There is not a tittle of evidence to shew that Rankin ever attempted to enforce any right he may have had under the letter from Wadleigh. He never asked Duggan for money. He never sued him. Duggan was at all times perfectly free to keep his money or to pay it to Wadleigh and to look to Wadleigh for his title. Instead of doing that when he found out that Wadleigh could not give him title, he went to Rankin, the original vendor, imagining he had some grievance against him and some rights against him. All that Rankin told him was: "If you will pay me what you owe to Wadleigh and give me $200 more, I will give you title to your lots." Duggan was perfectly free to accept that proposition or to reject it. He chose to accept it; and, although he had not the additional $200 available he chose to give a mortgage to secure it, and the mort-

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gage was given on the 9th July, 1908, and almost two years afterwards the plaintiff brings this action to set the mortgage aside because, as he said, it was obtained by duress and extortion, and was given without consideration.

In my opinion, the claim is utterly untenable. The plaintiff neither at the trial nor on the argument before us ever attempted to raise the question as to whether Rankin had been paid in full by Wadleigh. Surely, if such a position was possible to be taken, the plaintiff would have raised it at the trial. No evidence was tendered by the plaintiff upon the point, and the argument upon the appeal proceeded entirely upon the assumption that Rankin had not been paid in full. In my view, it is now too late to raise any question of that kind.

The appeal should be allowed, and the judgment below discharged, and judgment entered for the defendant Rankin dismissing the plaintiff's action as against him with costs, with judgment on the counterclaim for foreclosure in the usual way and for costs.

The respondent should also pay the costs of the appeal as between himself and Rankin, except the costs of the appeal-book. As between the appellant and the defendant Wadleigh, I think the appeal should be dismissed. As I read the judgment of the learned District Court Judge, he holds that Duggan is entitled to be idemnified by Wadleigh against the mortgage. As the payment of $200 or the giving of a mortgage to secure it was necessary and was practically part of the costs of securing title, it seems to me that the plaintiff is entitled to be indemnified by Wadleigh. The appeal by Wadleigh should, therefore, be dismissed with costs. I do not think that Wadleigh should be asked to pay the costs of an utterly unfounded action which the plaintiff saw fit to bring against Rankin; the plaintiff should bear the burden of this himself; but the judgment which the plaintiff is entitled to enter against Wadleigh in the Court below should be for the amount of the mortgage and interest thereon, to be entered only when the plaintiff satisfies a Judge that he has paid the mortgage, and for the costs of the action as against Wadleigh himself, and for the costs of this appeal in so far as these costs have been occasioned to the respondent by the appeal of Wadleigh.

SCOTT, J. (dissenting):—The defendant Rankin agreed to sell to one Magrath a block of lots in Strathcona. Ma-

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grath agreed to sell a portion of them to the defendant Wadleigh, who in turn agreed to sell one of them to the plaintiff. By subsequent agreements between Rankin, Wadleigh, and Magrath, the latter dropped out. Wadleigh was substituted for him as purchaser direct from Rankin, and he assigned to the latter the agreements entered into by him for sale to the plaintiff and others.

It appears to me to be clear that the plaintiff was equitable owner of the lot purchased by him fror Wadleigh, subject only to the payment of the purchase-money. As against Wadleigh, he would be entitled to a transfer, on payment of the purchase-money of the lot, but, as against Rankin, he would be entitled to a transfer from him, only upon the payment of the purchase-money due for the whole block.

In my view, this appeal turns upon the question whether the plaintiff was in a position to compel Rankin to transfer the lot to him. If he was in that position at the time the mortgage was given, I am of opinion that it was void for want of consideration, as it was given for moneys which Rankin was not entitled to exact. If he was not in that position at that time, the mortgage might be considered as standing as security for the payment of the moneys due him in respect of the sale of the whole block and to be satisfied on the payment thereof.

The evidence shews that the full amount due by the plaintiff to Wadleigh has been paid, but it is not clear that Rankin had been paid in full for the whole block, although it appears that he took back some of the lots in partial settlement, and that he has collected moneys from the plaintiff and others under their agreements for purchase.

If I am right in the conclusions I have stated, it follows that the effect of the subsequent agreements between Rankin, Magrath, and Wadleigh need not be considered. The plaintiff was not a party to them; and, therefore, his position cannot be affected by them. Nor is it necessary to consider whether they created privity between the plaintiff and Rankin, that privity having been created by the chain of agreements for sale, Rankin and Magrath having each in turn covenanted to convey to their purchasers and their assigns on fulfilment of their agreement.

I am further of opinion that, as against the plaintiff, Rankin is not entitled to charge as part of the purchase-money due him the $1,000 referred to in the agreements of the 28th March, 1908, and is only entitled to charge the

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balance of the purchase-money due him under the original agreement for sale to Magrath, or such lesser sum as he may subsequently have agreed to accept in satisfaction thereof. At the time the plaintiff purchased, Rankin was not legally entitled to claim that extra payment; and the fact that Magrath and Wadleigh subsequently agreed to pay it should not prejudice the plaintiff.

In my view, the judgment of this Court should direct that if the plaintiff within days gives the defendant Rankin notice that he desires a reference to the Clerk to ascertain whether Rankin has received payment or settlement in full for the lots sold by him to Magrath, such reference shall be directed by the District Judge and the question of costs reserved by him, and that the costs of this appeal be reserved until the final judgment in the Court below; and that, in default of such notice, the appeal of the defendant Rankin be allowed with costs and judgment entered for him upon the plaintiff's claim with costs, and upon his counterclaim for the amount due upon his mortgage with costs.

If such notice be given, and it appears upon the reference that the defendant Rankin has been paid his purchase-money in full, the plaintiff should, in my opinion, have judgment in the Court below for the cancellation of the mortgage with costs and for dismissal of the counterclaim with costs; but, if it should appear that the defendant has not received the full amount of his purchase-money, he should have judgment against the plaintiff upon his claim with costs and also judgment upon his counterclaim for the amount due upon the mortgage or for the balance of the purchase-money due him, if less than the amount of the mortgage.

Appeal of the defendant Rankin allowed (SCOTT, J., dissenting); and appeal of the defendant Wadleigh dismissed.

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## ALBERTA.

FEBRUARY 3RD, 1912.

SUPREME COURT EN BANC.

## ALFRED v. GRAND TRUNK PACIFIC R. W. CO.

*Contract — Construction — Breach — Damages — Jury — Interest.*

**The plaintiffs, acting on the faith of a telegram sent to them by the defendants' general manager, sent supplies into a district where they expected to do work under a railway construction contract. The telegram stated that the defendants were not, at the time it was sent, able to award the contract, but "if you will put in necessary supplies for such of this forty miles as you can complete in 1909, we will guarantee you cost and ten per cent. on same, in case anything should happen that it would be impossible to award you the contract." The contract was not awarded to the plaintiffs. An offer of a different contract was afterwards made by the defendants and refused by the plaintiffs. The defendants refused to purchase the supplies at "cost and ten per cent.;" and the plaintiffs, after giving the proper notice, sold the goods at the best price they could get, and brought this action against the defendants for damages for breach of the contract to purchase the supplies. At the trial, the jury found the plaintiffs entitled to recover $55,148.59, for which the trial Judge entered judgment, and the defendants appealed:—**

***Held*, upon the evidence and the interpretation and effect of the agreement, that the plaintiffs were entitled to recover, and that the amount of the damages was such as a jury might reasonably find.**

**Items of the plaintiff's claim, interest, and other items, considered.**

Appeal by the defendants from the judgment of HARVEY, C. J., in favour of the plaintiffs, upon the findings of a jury, for the recovery of $55,148.59, in an action for breach of contract.

The appeal was heard by SCOTT, STUART, BECK, and SIMMONS, JJ.

S. B. Woods, K. C., for the defendants.

E. B. Edwards, K.C., J. E. Wallbridge, and W. B. S. Craig, for the plaintiffs.

STUART, J.:—In my opinion, the decision of this appeal lies within a very narrow compass.

It is abundantly clear from the telegram from Mr. Morse to Alfred of the 30th November, 1908, that Alfred was promised either a contract for the first forty miles west of Wolf

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Creek or such part thereof as could be completed in 1909, or that, if such a contract was not given him, the company would purchase from him, at cost plus ten per cent., the supplies he might take in during the winter. It is clear that this promise was made as much in the interest of the railway company as in the plaintiffs' interest. Morse says, in his letter of the 4th December, that he is "just as anxious as you are to conclude the arrangement." This, no doubt, referred to a definite contract; but it shews that the general manager was anxious to have arrangements made for pushing the work in 1909; and, obviously, the company's contractors could get along faster if their supplies were taken in in the winter so as to be on hand.

The plain meaning of the letter and telegram is, that the plaintiffs were to get a contract for such work as they could do in 1909; and that, if they did not, then the company would take over their supplies. Obviously, the plaintiffs could not do all that was possible to do during the season of 1909, unless by the time that season opened they know whether or not they were to be allowed or engaged to do anything at all. Under the true interpretation of the document, therefore, the obligation lay upon the company to award a contract to the plaintiffs before the season opened, or to fulfill their alternative promise to take over the supplies. The defendants admit that they took upon themselves the risk of inability or unwillingness on their own part to award a contract to the plaintiffs; but they apparently wish the Court to assume that difficulties or uncertainties in the superior management of the company's affairs, leading to a delay in awarding any contracts at all, are not within the risk they took upon themselves; and that the plaintiffs should have been content to get a contract awarded to them, no matter when, provided it was done as soon as any contract was awarded to any one whatever. This, however, is, in my view, not the true position. On the contrary, if the defendants were not in a position, for any reason, no matter what, to award a contract to the plaintiffs in time to allow them the full working season of 1909 to complete it in, then, as I interpret the contract, they were bound to take over the supplies as arranged. It is admitted that Mr. Chamberlain's hands were tied until the 5th June, and that for some time even after that date the plaintiffs were not informed that a contract could now be definitely awarded, and that at that date a considerable part

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of the working season had already gone by. This being so, I see no necessity for considering the question of the amendment asked for in regard to a special contract, in February, nor indeed for considering the question whether or not there had been a definite recognition by the company's officials that their alternative obligation to purchase the supplies had now arisen. That was, it is true, a proper question to leave to the jury; but, whether there was such a recogntiion in fact or not, it is quite plain to me that the jury were properly instructed to consider whether the offer of a contract made on the 8th July was not really too late to be taken as a fulfilment of the first alternative obligation. Whether that was a question of law or not, is now of little moment. If it is a question of law, I agree with the learned Chief Justice that it was too late. If it is a question of fact, then, if it is necessary to support the verdict, we must assume that the jury also so found, under the directions quite properly given them by the trial Judge.

The company refused to purchase the supplies "at cost plus ten per cent.;" and the plaintiffs, after giving the proper notice under the Sales of Goods Ordinance, sold the goods at what is admitted to have been the best price they could get. The jury gave the plaintiffs a verdict for $55,148.59. It does not appear how the jury made up this amount. We cannot necessarily assume that they allowed any particular item objected to. All we can do is to inquire whether or not it was possible for the jury, as reasonable men, and allowing only such claims as are legally allowable at all, to arrive at that amount. If it was possible for them to do so, then the verdict must stand.

My brother Simmons has carefully and laboriously examined the various statements produced at the trial, in the light of the evidence given, and I have associated myself with him in that work. I agree with the conclusion at which he has arrived, that the jury could properly allow the amount for which the verdict was given.

The appeal should be dismissed with costs.

BECK, J.:—This is an appeal from the judgment of the Chief Justice upon a verdict of a jury.

The notice of appeal took the following grounds:—

"1. That the said judgment is against law, evidence, and the weight of evidence.

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"2. That the learned trial Judge erroneously held that the general manager of the defendant company had authority to enter into the contract sued upon.

"3. That the learned trial Judge wrongly held that there was evidence that the defendants had committed any breach of the said contract.

"4. That, on the evidence, the verdict of the jury was perverse.

"5. That the learned trial Judge erroneously admitted evidence, and erroneously excluded evidence.

"6. And upon such other grounds as may appear in the pleadings and proceedings."

Under our practice, I think that items 1, 5, and 6 were insufficient because too indefinitely stated.

On the 16th August, this was followed by a notice, which was stated to be "supplementary or explanatory," in which the grounds were stated as follows:—

"1. Morse's telegram of the 30th November, 1908, did not constitute a contract, owing to the absence of the seal of the defendants and of Morse's authority to commit the defendants to any such engagement.

"(a) The telegram was addressed to Alfred, and the plaintiffs are not competent to maintain this action, as there was no privity of contract between the defendants and the firm of Alfred and Wickham, or any correlative right or remedy which the defendants could enforce against that firm. To constitute a contract, there must be reciprocal obligations.

"2. Even if Morse's telegram constituted a valid contract, there was no breach thereof, as the work for the 40 miles referred to was duly tendered to Alfred and declined by him.

"3. Even if it should be held that a contract existed and was broken by the defendants, the damages are grossly excessive, as the cost of the supplies is conclusively fixed by the resale to Stewart, and the measure of damages would be simply the price received by Alfred for his supplies from Stewart.

"4. That, under the circumstances disclosed in the evidence, Alfred was not entitled to payment of ten per cent. of cost; but, if he should be held entitled to such ten per cent., the cost would be the price at which the goods were taken over by Stewart."

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This notice again was followed by a further notice on the 15th September, as follows:—

"Take notice that, pursuant to your request for further details touching the grounds of appeal, the appellants propose to put their case, generally speaking, before the Court upon the following grounds:—

"1. That the appellants are entitled to have the application for a nonsuit made at the trial granted on the grounds: (a) that no contract by the appellants with the respondents on the record is proved; (b) because, if such a contract was made by the correspondence had between the respondent Alfred and Mr. F. Morse, the then vice-president and general manager of the appellants, such contract was performed and satisfied, upon the respondents' testimony, in February, 1909, when they were given a contract such as was within the contemplation of the parties when the original transaction, as evidenced by the said correspondence, took place; (c) that the respondents' evidence at the trial was not directed towards proving and did not prove a breach by the appellants of their agreement to procure the respondents a sub-contract from Foley, Welch, & Stewart; (d) that no case is made upon the pleadings founded upon the interview had between the respondent Alfred and Mr. Chamberlain, the general manager of the respondent company, at Winnipeg, in April, 1909.

"2. That the verdict of the jury was grossly excessive and perverse upon the question of damages, and particularly that the jury had no power, as a matter of law, to award interest as a part of their verdict, and that, having done so, and the amount of their verdict being one lump sum, and it being impossible to separate the amount so improperly awarded for interest from the amount awarded by them as damages, there has been a mistrial.

"3. That, in any event, the case should not have been left to the jury with the instructions that, if they believed the statements of the respondents' witnesses to the effect that in April, 1909, it was decided to declare the whole matter off as far as the giving of the contract was concerned, the jury would have to consider that from that time the question of contract was at an end, and that the appellants were responsible for the price of the goods with ten per cent, added (see Judge's charge, p. 332), because no case was made out

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upon the pleadings entitling the trial Judge to leave that matter to the jury in this way.

"4. That the trial Judge should not have told the jury that, if they thought it was not reasonable to expect the respondents to take a contract in June, then the jury would be entitled to conclude that the company were responsible for the value of the goods taken in, there being no such issue raised upon the pleadings, and no evidence directed towards any such issue.

"And upon the other grounds already taken in the notice of appeal and supplementary notice of appeal served herein."

I would not permit the defendant company to raise now any ground, not going to the merits of the case, which was not open under the original notice of the appeal; and on the argument I said to Mr. Woods, counsel for the defendant company, that for my part I would not be ready to consider any grounds, going to the merits, which were open under the original notice of appeal, if he persisted in pressing what I thought were unmeritorious grounds; and I understood him to say that, if he were allowed to go into the real merits of the case, namely, the question of the interpretation and effect of the agreement, its breach, and the proper amount of damages, if any, he was satisfied to abandon the other grounds. I think, therefore, that this appeal should be dealt with only on these latter grounds.

The contract in question is contained in a telegram sent by Frank W. Morse (then vice-president and general manager of the defendant company) to the plaintiff Alfred as follows:—

"Montreal, November 30th, 1908. Frank H. Alfred, Esq., Edmonton, Alta. Unable to at this time definitely award contract for the forty miles you desire. In order to keep your teams employed this winter, will say that if you will put in necessary supplies for such of this forty miles as you can complete in 1909, we will guarantee you cost and ten per cent. on same, in case anything should happen that it would be impossible to award you the contract. Frank W. Morse."

As a result of this arrangement, the plaintiffs shipped into the territory where it was contemplated the work should be done, a large quantity of such supplies as they would require in the event of a construction contract being event-

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ually awarded to them. This was done mainly during the winter months of 1908-9, and in the spring of 1909, the last supplies being taken in about the middle of April. Some time in January, 1909, Mr. Chamberlain became vice-president and general manager of the defendant company in succession to Mr. Morse.

Alfred met Chamberlain in Winnipeg on the 21st April, 1908, and conferences took place between them. The evidence as to what took place at those conferences is conflicting. Alfred's version is confirmed, however, by letters.

On the 26th April, Mr. Kelliher, the chief engineer, wrote Chamberlain as follows: "In compliance with your instructions of the 23rd inst., and returning Mr. Alfred's letter of the 22nd inst. which accompanied it, I wish to inform you that I immediately issued instructions to Division Engineer Jones to check up receipts, etc., for all supplies put in by Mr. Alfred on the work west of Wolf Creek, as per his former arrangement with this company, prepare a complete itemised statement of quantities and cost of all the supplies found on the work put in by Mr. Alfred. During the period that Mr. Alfred was putting in the supplies, we kept a man especially on the ground to check receipts for these supplies; and Mr. Alfred informs me that he also had him indorse cheques for payment. From this there should be no difficulty in making an absolutely correct list which would supply all the data ready for transfer to Mr. Stewart or for voucher by this company for payment to Mr. Alfred, whichever course is adopted."

This letter was written en route to Montreal, and was acknowledged by Mr. Chamberlain by letter to Kelliher: "Referring to your letter of the 26th relative to supplies placed on line 40 west of Wolf Creek by Mr. Alfred, I wish, as soon as you obtain this itemised statement, that you would forward same to me so that I may take it up with Mr. Stewart."

Mr. Stewart was a member of the firm of Foley, Welch, & Stewart, large contractors, who, owing to their connection with the defendant company, were the persons with whom, under either view of the effect of the April conference, naturally, arrangements would be made for the taking over of the plaintiffs' supplies. I would, therefore, accept as correct the reasonable account given by Alfred. At all events, the jury might well accept it, and the question of the result of those conferences was quite distinctly put to them by the

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learned Judge's charge in this way: "If you believe, on the testimony of the plaintiffs' witnesses, that it was then decided that, in view of the fact that the contract could not then be let, the whole matter would be declared off as far as the contract was concerned, and the company would assume the liability of the original telegram, and undertake to be responsible for the costs of the goods and ten per cent., then I think you would have to consider that, from that time on, the question of contract was at an end, and the defendants were responsible for the price of the goods with the ten per cent. added." And again: "If, as I say, you come to the conclusion that at the interview in April it was accepted by Mr. Chamberlain that the question of the contract should be put an end to and the company should become responsible for the supplies, that disposed of all the case, I think, and I do not think you need to concern yourselves any more, because the plaintiffs could not be expected then to take any contract after that."

Counsel for the defendant company object to this way of putting it to the jury, on the ground that what took place at these conferences, even taking the plaintiffs' version, must necessarily be taken as constituting a new contract, and that no such contract is alleged in the pleadings. There is, I think, more than one answer to this. I think there was not a new contract, but a distinct admission by the defendant company that the circumstances had become such that the company could not award the plaintiffs the construction contract as originally contemplated; and, consequently, that the alternative provision for payment by the company had come into effect. This aspect of the case was put with sufficient distinctness in the statement of claim; and, in any case, it is clear that all the available evidence bearing upon what took place at those conferences was given; and, that being so, full effect should be given to it irrespective of the form of the pleadings.

Taking this view, which the whole circumstances of the case convince me was in effect the view taken by the jury, I do not think it necessary to follow in detail what took place subsequently, because, even if the jury by possibility took a different view of the case up to this stage, it is obvious that they must have found with relation to subsequent matters entirely in the plaintiffs' favour, and I do not see how they could reasonably have found otherwise.

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The amount of the damages awarded is questioned. The amount claimed was $66,038.59. The amount of the verdict is $55,148.59. The difference is $10,893.59. This difference seems to cover all amounts which it can fairly be contended were not properly included in the particulars of the plaintiffs' claim.

I would, therefore, dismiss the appeal with costs.

SIMMONS, J.:—The plaintiffs are railway contractors, and Alfred, one of the plaintiffs, during the latter part of the summer and during the fall of 1908, entered into correspondence with Frank W. Morse, vice-president and general manager of the defendant company, soliciting from Mr. Morse a contract for construction on the defendants' railway then being built between Edmonton and the mountains; and, in reply to Alfred's inquiries, Mr. Morse sent Alfred the following telegram from Montreal on the 30th November, 1908: "Montreal, Nov. 30th, 1908. Frank H. Alfred, Esq., Edmonton, Alta. Unable to at this time definitely award contract for the forty miles you desire. In order to keep your teams employed this winter, will say that if you put in necessary supplies for such of the forty miles as you can complete in 1909, we will guarantee you cost and ten per cent. on same, in case anything should happen that it would be impossible to award you the contract. Frank W. Morse."

On the 4th December, 1909, Mr. Morse wrote Alfred the following letter: "Dear Mr. Alfred: I enclose copy of message sent you on November 30th and one of even date. Have before me your letter of the 29th. I fully understand your anxiety and strong desire to have this matter settled, and am just as desirous as you are to conclude the arrangement. However, owing to our president being abroad, and the exact scope of our operations next year not having been determined, and not wishing in any way to mislead you, which might later on result in embarrassment and loss to you, am using my best judgment and caution in advising you. Yours very truly, Frank W. Morse."

On the 10th December, 1908, Mr. Morse wrote Mr. Alfred as follows: "I have your note of December 1st, acknowledging receipt of my telegram of the previous day reading as follows: 'Unable at this time definitely award contract for the forty miles you desire. In order to keep your teams employed this winter, will say that if you will

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put in necessary supplies for such of this forty miles as you can complete in 1909, we will guarantee you cost and ten per cent. on same, in case anything should happen that it would be impossible to award you the contract.' With a view to having at hand all necessary information in connection with your expenditure for supplies, in the event of your not obtaining the contract, will you please have made up, as soon as possible after the close of each month, a statement of your expenditures, accompanied by copies of bills, invoices, etc., and submit to Mr. R. W. Jones, our division engineer at Edmonton, giving him an opportunity to check receipt of supplies into the storehouse, as well as to keep check on number of teams, men, etc., engaged in the work of transportation and delivery. Mr. Jones will be instructed by Mr. B. B. Kelliher, chief engineer, to give the matter attention on the lines mentioned. Please acknowledge receipt. Yours truly, Frank W. Morse, vice-president and general manager."

On the 15th December, 1908, Mr. B. B. Kelliher, chief engineer of the defendant company, under instructions from Mr. Morse, wrote R. W. Jones, division engineer of the defendant company, as follows: "For your information I attach copy of correspondence referring to the putting in of supplies this winter on the first forty miles west of Wolf Creek. Discuss this subject with Mr. Alfred, and keep in close touch with the expense he incurs in putting in supplies, so that you will be able to certify to the expenditure. This in order to make an amicable settlement of accounts, in the event of anything unforeseen occurring that would make it impracticable, under our present arrangement, for Mr. Alfred to carry out the work. Make me monthly reports on this subject, accompanied by duplicate copies of all bills and all other expenses incurred by Mr. Alfred. Yours truly, B. B. Kelliher, chief engineer."

In pursuance of the arrangement set out in the above correspondence, the plaintiff Alfred, who had associated with himself the plaintiffs B. P. Wickham and E. A. Wickham, commenced shipping supplies to McLeod River and Big Eddy, on the line of the proposed construction work. Prior to the 30th November, 1908, Mr. Alfred had filed with Mr. Morse a tender for forty miles of construction westward from Wolf Creek, and Kelliher disclosed to Alfred the tender of Foley, Welch, & Stewart, railway contractors, for the

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same work; and Kelliher admits it was in the interest of the defendants to have competing tenders. The supplies were shipped by rail on the Canadian Northern Railway to Stoney Plain, a point about seventeen miles west of Edmonton, and transported on sleighs for a distance of about one hundred miles to McLeod River and Big Eddy. It appears that, in order to carry on construction work in the following summer, it was necessary to get in supplies during the winter, when the ground was frozen, as the character of the country rendered it impracticable to do the shipping in the spring and scmmer.

In January, the plaintiff Alfred advised Mr. Morse of progress in the transportation of supplies by letter as follows: "Edmonton, Alta., January 7th, 1909. My dear Mr. Morse: I have already contracted for a large supply of oats, and am closing for a supply of hay, and have started freighting west. We could not commence freighting earlier, as the snow came the last of December. I have kept the arrangement absolutely to myself (except for Mr. Wickham, who understands), yet it is getting about that we are freighting west. I sent a party to the Big Eddy on the McLeod last month to erect warehouses, and we purchased a number of heavy sleighs for freighting, which I think has caused those interested to wonder. I am completing my arrangements with the White Company for the plant, on the strength of getting the contract. I have put them off so long that they (and justly too) have pressed me for a final conclusion of our arangement. I hope you can wire or write me that you are now in a position to definitely award us the contract for the forty miles west from the McLeod River. It will help us very much to be able to have all sub-contracts that we intend giving out made as early as possible. I am busy with details of freighting, and would prefer to complete the formality of the contract without coming to Montreal this month, although we stand ready to come whenever necessary and convenient to you. It has been intensely cold for several days—the temperature registering 50 degrees below last night, and several reports indicate as low as 56 below. It is 34 below in the sun as I am writing at 2 p.m. Yours truly, Frank H. Alfred."

Mr. Morse replied on the 13th January, 1909, in the following telegram and letter:—



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"Montreal, January 13th, 1909. Frank H. Alfred, Esq., c/o Alberta Hotel, Edmonton, Alta. Letter seventh received. Glad to note progress you are making. Am writing. Frank W. Morse."

"January 13th, 1909. Dear Mr. Alfred: Yours of January 7th received, and I have wired you as per enclosed. Can readily understand that you could not purchase sleighs and supplies and start transporting the latter, without same being observed and comment being made. No harm can come from this; the only thing is, let us not advertise it ourselves. The conditions relative to letting contracts are the same as when I last wrote you. You have no cause for apprehension or worry, as the work will have to be done, and you will be in a better position than any one else. I know that it will be a great relief to have concluded matters, and trust we may have the satisfaction of doing so in the near future. Trusting that the year will prove a prosperous and happy one for you, I beg to remain, Frank W. Morse."

The plaintiffs continued shipping supplies during the months of January, February, March, and the early part of April; and the defendants, pursuant to the arrangements made, had the supplies checked under the direct supervision of their divisional engineer, Mr. Jones.

About the end of January, Mr. Morse retired from the position of vice-president and general manager of the defendant company, and was succeeded by E. J. Chamberlain; and, at Chamberlain's request, a meeting took place at Winnipeg on the 2nd February, 1909, between the plaintiffs and Mr. Chamberlain and B. B. Kelliher, and they suggested to the plaintiffs that the plaintiffs should accept a contract from Foley, Welch, & Stewart, at the price of the plaintiffs' tender made in the fall of 1908, and that the mileage be 23 miles, instead of 40 miles, with the privilege to the plaintiffs to receive further mileage, if they should be able to undertake it; and to this the plaintiffs agreed. The plaintiffs stated that they understood that the defendants were to make all the arrangements with Foley, Welch, & Stewart. The plaintiffs continued, during February and March and the first part of April, furthering their arrangements to commence active construction work as soon as spring opened; and, in the latter part of the month of April, failing to get any positive assurance either from the defendants or from Foley, Welch, & Stewart that they

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would be awarded any contract or given any work on the railway construction, the plaintiff Alfred went to see Chamberlain at Winnipeg on the 20th April, 1909, and an interview took place between them, about which there is a considerable conflict of evidence. It is quite beyond dispute that Chamberlain admitted that the defendant company were not in a position then to award any contract, either direct or through Foley, Welch, & Stewart. Alfred says that Chamberlain proposed that the plaintiffs try and make an arrangement with Foley, Welch, & Stewart to take over the supplies, and that he, Alfred, refused to do so, and insisted that the time had arrived when the plaintiffs had the right to demand that the defendants take over the supplies, under the terms of the telegram of the 30th November, 1908, paying actual cost and ten per cent., and that Chamberlain agreed to do so. Chamberlain says he did not go further than to undertake to negotiate for the plaintiffs with Foley, Welch, & Stewart with a view of getting the latter to take over the plaintiffs' supplies. Under directions from Chamberlain, Kelliher issued instructions to Mr. R. W. Jones, divisional engineer, to check over the supplies, as (extracts from Kelliher's letter to Jones) "it is proposed that we take over the supplies that Mr. Alfred put in some months ago west of Edmonton. . . . The arrangement is, that we take the supplies over from Mr. Alfred and pay him and have Stewart take over the supplies from us and refund to us what we paid Alfred."

The supplies were checked under the directions of Mr. Jones, and some six weeks were occupied in doing this. On the 23rd June, Jones, having completed the checking, forwarded a statement of the same (exhibit 15) to Mr. Kelliher, and on the 16th June, 1909, and the 25th June, the plaintiffs demanded from the defendants payment for the same or a payment on account.

On the 21st June, the defendants let a contract to Foley, Welch, & Stewart for construction west of Macleod River, and the plaintiffs met Chamberlain, Kelliher, and Stewart at Edmonton on the 7th and 8th July, and the plaintiffs renewed their demand for payment. Chamberlain suggested that they arrange with Stewart to have him take over their supplies, or, in the alternative, take a sub-contract from Foley, Welch, & Stewart, or a contract direct from the defendants. The plaintiffs refused to consider a sub-contract or a contract direct from the defendants, as

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they had parted with part of their plant and transferred their supplies to the defendants, and it would be impossible for them to attempt to undertake a construction contract at that late date.

The plainiffs then gave notice to the defendants, under the Sale of Goods Ordinance, of their intention to sell the goods, and, having sold them at a loss, brought this action to recover their loss. The jury assessed damages against the defendants in the sum of $55,148.59; and against this finding the defendants appeal.

In his charge to the jury, the learned Chief Justice left it to them to say whether, at the interview in April at Winnipeg, it had been agreed between the parties that the whole matter, in so far as awarding a contract to the plaintiffs was concerned, had been declared off, and the company had agreed to take over the supplies in accordance with the telegram of the 30th November, 1908, and, in the alternative, whether the offer of the defendants in July, 1909, to award the plaintiffs a contract was in compliance with the terms of the telegram.

There is nothing to indicate on which of these the jury found against the defendants; but there seems clearly to be evidence on either of which, if believed by the jury, their finding can be supported. If they believed the plaintiffs' version of what took place at the interview in Winnipeg in April, then the defendants agreed to assume the obligation of paying for the goods on the terms of the telegram of the 30th November, 1908; and the acts of the defendants for some six weeks after this interview are not inconsistent with this conclusion. On the other hand, if the jury based their conclusion on the ground that the offer of July was not a compliance, that would seem to be reasonable under the circumstances. The plaintiffs could hardly, under the circumstances, be expected to commence, at that late date, to carry out a somewhat large contract, which, it seems clear, was to be completed in 1909. The contracting season was about half over, they had very little time to get in plant and machinery, and the season was quite unsuitable for transporting plant and machinery.

In view of this, then, the question as to whether the damages were excessive is the only issue to dispose of.

It is a somewhat difficult one to deal with, in view of the fact that counsel for the defendants on the appeal relied upon certain inferences which, he contended, were sup-

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ported by the evidence, and which were apparently not urged by counsel at the trial, and to which I shall subsequently refer.

During the period that the supplies were being shipped by teams from Stoney Plain, a check of amounts and prices was furnished by the plaintiffs to the defendants, at the request of the defendants. Mr. Morse instructed Mr. Kelliher, chief engineer, in regard to this checking, on the 7th December, 1908. The goods were rechecked at the caches at McLeod River and Big Eddy by the plaintiffs and defendants, both having representatives. The checking began about the 1st May, 1909, and occupied about six weeks; and from this checking exhibit 35 was prepared by the plaintiffs, and, after revision by R. W. Jones, who was supervising the checking pursuant to instructions from Kelliher, was forwarded by Jones to Kelliher under letter of the 23rd June, 1909:—

"Edmonton, Alberta, 23rd June, 1909.

"Mr. B. B. Kelliher, Chief Engineer, Winnipeg, Man.

"Dear Sir: I enclose herewith statement of supplies at present cached by Alfred, Wickham, & Co., at McLeod River and Big Eddy. At the bottom of the statement of supplies at McLeod cache I have summarised all expenditures in connection with these supplies.

"I have, in all cases where practicable, reconciled the quantities with invoices furnished by Mr. Alfred. In a number of instances, though, such as cooking equipment, repairs, etc., the stuff purchased for the contract which these people hold east of the Pembina River and bought last year, were used during the summer and forwarded west during the winter months. In these instances I have not been able to secure the original invoices, and in consequence have had to accept Mr. Alfred's prices. This also applies to the tents.

"There is considerable shortage between this statement of supplies at present in the above-mentioned caches and the amount purchased by Mr. Alfred and forwarded west, owing to shrinkage, etc., supplies being used for maintenance of cache keepers, helpers and teamsters, and amounts lost by freighters.

"I attach a statement made up by Mr. Alfred shewing amount paid to independent freighters for hauling out supplies, statement of wages paid to cache keepers and helpers, and also a bill for their own teams at $8 per day.



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"The item of insurance I have checked up against the cheque issued to Allan, Lang, Killam, & McKay.

"The board of checkers at Stoney Plain was checked up against the hotel bill at that point.

"Item of freight to Stoney Plain I have taken from Mr. Alfred's books.

"Mr. Alfred is preparing a bill shewing all supplies bought, crediting the company with board of his teams, etc., and intends to take a trip to Winnipeg in the near future, and will take this statement with him. He will also bring all invoices and records to substantiate his claim, but the actual amount of stuff at present stored at the McLeod cache and Big Eddy cache is as per attached statement.

"Yours truly,

"R. W. Jones, Division Engineer."

"P.S. Mr. Alfred has retained statement shewing number of days of their own teams, and will bring this with him when he goes to Winnipeg. I have, however, shewn the total number of days on statement."

And this was followed by a letter from Jones to Kelliher, undated (exhibit 34), which is as follows:—

"Mr. B. B. Kelliher, Chief Engineer, Winnipeg, Man.

"Dear Sir: With reference to statement of supplies shipped west by Mr. F. H. Alfred. Owing to the rush in getting the statement to you, I was unable to check the extensions on the different items as carefully as I would wish, but to-day have gone over these and find the following errors. I would be glad if you would make alterations in statement sent you.

"One bag of tapioca 141 lbs., equals 138 lbs. net at 5¾c., should be $7.94.

"One bag of currants, 87 lbs., equals 75 lbs. net at 7½c., should be $5.62.

"Two bags, 168 lbs., equals 150 lbs. net at 7½c., should be $11.25.

"Making the total at McLeod cache $15,682.01.

"Big Eddy cache:—

"39 cases of peaches, 975 lbs. (500 lbs. at 8c., 475 lbs. at 8¼c.), should be $79.19.

"16 coffee pots, at $5.56 per doz., should be $7.41.

"Making a total at Big Eddy cache, $33,291.15.

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"This will alter the total of summary at bottom of McLeod cache statement to $143,123.23.

"Yours truly,

"R. W. Jones, Division Engineer."

A memorandum made on this letter reads: "H. E. B.: Keep this on hand for reference. It is being arranged between Stewart and Alfred in Edmonton. B. B. K."

It would appear quite evident from Alfred's evidence, pp. 34 and 48, that in his letter of the 25th June, 1909, (exhibit 18), exhibit 19 is the statement referred to therein, and I think it is a fair and reasonable inference that Alfred was then basing his demand for compensation, in so far as the actual cost of the supplies is at issue, upon that statement, namely, exhibit 19. He advises the defendants that their division engineer has forwarded this statement, and asks for a payment of $100,000 on account. Alfred's explanation of the discrepancy between these two statements, namely, between exhibit 19 and exhibit 35, which aggregate $153,030.88 and $143,123.33 respectively, when corrected (see p. 83 of case), is as follows:—

| | |
|---|---|
| On a/c of shortage in hay | $ 1,391 00 |
| On a/c of shortage of oats | 640 00 |
| Goods used by checkers and cache keepers | 2,800 00 |
| Superintendence | 3,000 00 |
| Interest | 2,613 33 |
| | $10,444 33, |

or $520.55 more than the difference. The plaintiff Alfred computes the claim of the plaintiffs at $159,610.53, after deducting $7,930 on account of plant and adding ten per cent. (see case p. 85). The plant was sold for $6,360, and this amount should be deducted from the proceeds of sales, that is to say, from $111,549.93, leaving a balance of $105,189.40 as net proceeds of sale of supplies. The difference between this and $159,610.53 is $54,421.13. The trial Judge instructed the jury that they might add interest from the time the moneys were due and payable, if they found that the defendants had improperly withheld payment of the debt. If the jury fixed the time of payment at the later date, namely, the 21st July, 1910, and computed interest at five per cent., I find there would be approximately $5,579.87 added for interest, computed as follows:—

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| | |
|---|---|
| July 21, 1909, to Aug. 1, 1909, Int. @ 5% on $159,610.53 ..... | $665 04 |
| Aug. 21, 1909, to Sep. 21, 1909, Int. @ 5% on $149,610.53 ..... | 623 37 |
| Aug. 21, 1909, to Sep. 21, 1909, Int. @ 5% on $124,610.53 ..... | 519 20 |
| Oct. 23, 1909, to Mar. 3, 1911, Int. on $ 54,422.13 ..... | 3,772 26 |
| Total ..... | $5,579 87 |

This sum of $5,579.87 added to $54,429.13 is $60,000, or nearly $5,000 more than the assessment by the jury.

At the trial (see case, p. 119), when the plaintiffs were submitting evidence of John McNamara as to quantities of goods stored at McLeod and Big Eddy caches, Mr. Tate, counsel for the defendants, said: "I will not dispute, as far as I know at present, the quantities of stuff that were there. I don't see that my learned friend need labour over that" (case p. 119). And: "All I will say, I will not dispute the quantities of the goods, plant, and material that are said to have been taken into the caches, that is all" (case p. 120). Counsel on appeal (Mr. Woods) wished to qualify this and confine the plaintiffs to the statement exhibit 35, as an admission of the plaintiffs that exhibit 35, which was put in by the plaintiffs, must be taken as against exhibit 19, where there was a discrepancy in favour of the defendants between the two statements. It seems quite evident that Mr. Tate did not take this view, and I do not think the plaintiffs should have to meet the contention of the appellants in this regard before this Court. The only items making up the amount which seems to be a matter of contention, then, are: insurance, $1,625; interest prior to the 21st July, 1909, $2,685.53; superintendence, $3,000; and the item of $37,176 for Alfred & Wickham's teams, 4,647 days at $8 per day.

As to insurance, I do not think the defendants could properly be charged with this, unless the jury found that the period at which the defendants should have paid for the goods had arrived in April. They were instructed by the trial Judge that they might so find; and, if they did so, then the plaintiffs had a vendors' lien for the price of goods, and properly insured to protect their lien, and properly charged the insurance as a claim by virtue of their lien. The question of interest prior to the 21st July, 1909, would also

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depend upon which period the jury may have fixed as that at which the liability arose. If in April, 1909, then the interest would properly be allowed, and if in July, it should be struck out.

As to the item of $3,000 for superintendence, this seems to be an unreasonable amount. The time over which the superintendence extended was about six months, and a competent man to supervise such work should not have incurred an expenditure of more than, say, $150 per month, or $900. I think this amount should be reduced by at least $2,000, as the ten per cent. above cost could not be interpreted as meaning anything more than actual cost, and the plaintiffs have given no particulars of this item, but put it in a lump sum, apparently to cover the time and expenses of the three partners. They were contractors, and I think it was an ordinary risk of their business to look after the negotiations pertaining to securing contracts and preparing for the execution of them; and it could never have been contemplated by the parties that the ten per cent. would cover such as this.

As to the item made up of $8 per day for freighting by Alfred & Wickham's teams, there is considerable conflict of evidence. Stewart, of Foley, Welch, & Stewart, says that he could get teams to freight between these points at $6 per day, and Kelliher says the same. Stewart allowed the plaintiffs $45 and $50 per ton for freight to these points; and it is not clear just what amount teams could earn at this rate. The plaintiffs estimated it at $8 per day, and the trial Judge left it to the jury to say whether that was a proper charge. Their verdict does not indicate the rate allowed by them; but I think it is quite clear they did not allow more than $8, and I see no reason for disturbing their verdict in regard to this.

The statute governing the awarding of interest under which the trial Judge instructed the jury that they might add interest from the date on which the debt became due, is: "In addition to the cases in which interest is by law payable, or may by law be allowed, the Court may in all cases where, in the opinion of the Court, the payment of a just debt has been improperly withheld, and it seems to the Court fair and equitable that the party in default should make compensation by the payment of interest, allow interest for such time and at such rate as the Court may think right" (ch. 20, Alberta, 1908).

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In the computation I have made, I have allowed five per cent. interest from the 21st July, 1909, until judgment. The jury may have assessed interest at a higher rate, and quite properly so, under the above statute, and may have found the date when payment was improperly withheld as of April instead of July, 1909. Either or both of these circumstances would add considerably to the amount I have computed for interest. Allowing, then, a deduction of $2,000, or even eliminating altogether the charge of $3,000 for superintendence, there seems to be a considerable margin which the jury might have found over and above what they did actually find against the defendants; and their verdict should not be disturbed.

I would, therefore, dismiss the appeal with costs.

SCOTT, J., agreed in the result.

*Appeal dismissed with costs.*

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## SUPREME COURT OF CANADA.

OCTOBER 24TH, 1911.

### GIRVIN v. THE KING.

*Criminal Law—Arson—Evidence—Verdict.*

Evidence making a *primâ facie* case for the Crown in a criminal prosecution, if unanswered, and believed by the jury, is sufficient to support a conviction of the person accused.

Judgment of the Supreme Court of Alberta, *Rex* v. *Girvin*, 18 W. L. R. 482, affirmed.

Appeal from the judgment of the Supreme Court of Alberta, Rex v. Girvin, 18 W. L. R. 482, affirming (by a division of opinion) the conviction of the appellant, at the trial, upon an indictment for arson, on an appeal by special leave upon questions of law in respect of which the trial Judge, STUART, J., refused to reserve a case for the opinion of the Court in banco.

The following statement was made by the learned trial Judge in refusing the application for a reserved case by counsel for the appellant.

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STUART, J.:—I refuse to reserve the following questions for the opinion of the Court, en banc, at the next sittings of the said Court to be holden at Calgary, in Alberta:—

(I.) Does the evidence merely point to a suspicion of guilt instead of being the legal evidence necessary to support a conviction?

(II.) Was I right in refusing to dismiss the charge against the accused at the close of the case for the Crown upon application made by counsel for the accused?

(III.) Was the evidence of the witnesses McMinn and McIntosh as to the removal of certain horses alleged to be the property of Samuel Wilson, pursuant to an alleged arrangement with the said Wilson, properly admitted by me, there being no evidence that the accused had any knowledge of any horses being on the premises, of their removal, or of any such arrangement, and objection being taken by counsel for the accused?

(IV.) Was that portion of my charge to the jury, being, "a person who tells an untruth when not under oath is not a person who is likely to be believed even when they are under oath" improper?

(V.) Was that portion of my charge to the jury proper, being, "people do peculiar things, and yet is it a probable thing that she would do—to leave a bundle of papers there in that store in a drawer which was apparently unlocked for so long containing incriminating evidence against her husband of his relations with another woman," there being no evidence whatever of the said papers containing any incriminating evidence?

(VI.) Was I right in refusing to allow counsel for the accused to have the said papers handed in to the jury while deliberating upon their verdict unless so requested by the jury?

The appeal to the Supreme Court of Canada was heard by FITZPATRICK, C.J.C., DAVIES, IDINGTON, DUFF, ANGLIN, and BRODEUR, JJ., on the 19th October, 1911.

A. A. McGillivray, for the appellant.

Wallace Nesbitt, K.C., and Christopher C. Robinson, for the Crown.

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The judgment of the Court was delivered by

FITZPATRICK, C.J.C.:—I have always understood the rule to be that the Crown, in a criminal case, is not required to do more than produce evidence which, if unanswered, and believed, is sufficient to raise a prima facie case upon which the jury might be justified in finding a verdict. A careful perusal of the evidence here satisfies me that there is evidence quite sufficient to prove that the house was destroyed by a fire under circumstances which clearly pointed to incendiarism, and that the accused might fairly be presumed to have set the fire. When the Crown's case was closed, of the three persons who had means of access to the building on the night of the fire, two had given their evidence, frankly and fully testifying to all that occurred; the third, the accused, volunteered to go into the witness-box and attempted to explain away those things which were calculated to throw suspicion upon her. To say the least, her explanation is not satisfactory. Her denials of facts that are proved beyond all doubt are very much to her discredit. In any event, the jury, having had occasion to hear the story of the three persons who alone admittedly might have caused the fire, and the theory of accident being eliminated, came to the conclusion, on evidence which, in my opinion, was sufficient, that the appellant was guilty of the offence with which she was charged, and no reason has been given here to justify us in setting that verdict aside. The facts are so fully and clearly discussed in the judgments below, that I do not feel it necessary to say more.

*Appeal dismissed.*

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THE

# Western Law Reporter

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## ALBERTA.

FEBRUARY 3RD, 1912.

SUPREME COURT EN BANC.

## ACME CO. v. HUXLEY.

*Equitable Mortgage — Deposit of Transfer under Land Titles Act—Absence of Certificate of Title—Validity of Deposit as Mortgage—Amount for which Pledged—Husband and Wife—Agency — Agent Exceeding Authority —Innocent Mortgagee—Absence of Notice—Order Compelling Production of Certificate — Representation—Estoppel—Land Titles Act, sec. 44.*

An appeal by the defendant from the order of BECK, J., 18 W. L. R. 534, was dismissed, the four members of the Court *en banc* being divided in opinion.

*Held*, by HARVEY, C.J., and SCOTT, J., that the defendant, having put in her husband's hands a transfer, duly executed by her and duly attested for registration purposes, thereby represented to the plaintiffs that he was entitled to deal with the property as his own; and, after they had acted on that representation, she could not, to their prejudice, be permitted to shew that such was not the intention.

*Held*, by STUART and SIMMONS, JJ., that, under the Land Titles Act, a transfer executed in accordance with the Act does not pass the legal estate in the land until registered. If the registered owner, instead of receiving the full purchase-price, merely executes the transfer for a limited purpose, without receiving any real purchase-money, the legal estate must remain in him: and, as between him and the transferee, the beneficial interest will be determined by the actual relationship or bargain between them. The legal estate always remained in the defendant, and was coupled with a serious beneficial and equitable interest; and the mere equitable interest, if any, of the plaintiffs was not entitled, upon any equitable ground, to be given priority over the defendant's equitable interest, coupled with the legal estate. The deposit of the transfer to the husband was not an equitable mortgage by the deposit of title deeds; for the husband had no estate to pledge or mortgage; and no title deeds of the defendant, the wife, were ever deposited. And, even if an equitable mortgage had been created, the plaintiffs' equity would be no higher than that of the defendant; for the transfer was deposited,



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**not as a present security for unpaid purchase-money at the date of sale, but subsequently, and only as additional security for a past indebtedness. The plaintiffs did not surrender any other security as a consideration for the deposit of the transfer, nor did they refrain from exercising any legal right they might otherwise have enforced. The plaintiffs took the transfer subject to all equities existing between the defendant and her husband. The retention of the legal estate, and of the evidence of it furnished by the certificate of title, was sufficient notice of the limitation of the husband's authority. So far from the transfer being a representation that the husband could pledge the legal estate, it was, on the face of it, notice that he had no legal estate to pledge, and furnished reasons for suspecting that he had no equitable estate to pledge. Section 44 of the Land Titles Act makes the certificate of title conclusive evidence of title, except in the case of fraud in which the owner has participated or colluded. There is no finding and no evidence of fraud on the part of the defendant—the certificate is invoked to defeat a fraud, in which the plaintiffs did not participate, but of which they were seeking to get the benefit.**

*Rimmer* v. *Webster*, [1902] 2 Ch. 163, considered.

Appeal by the defendant from the order of BECK, J., 18 W. L. R. 534.

The appeal was heard by HARVEY, C.J., SCOTT, STUART, and SIMMONS, JJ.

Frank Ford, K.C., and I. B. Howatt, for the defendant.

C. A. Grant, for the plaintiffs.

HARVEY, C.J.:—In my opinion, the appeal should be dismissed with costs, and I base my opinion altogether on the ground that the defendant, having put in her husband's hands a transfer, duly executed by her and duly attested for registration purposes, thereby represented to the plaintiffs that he was entitled to deal with the property as his own; and, after they have acted on that representation, she cannot, to their prejudice, be permitted to shew that such was not the intention.

In Rimmer v. Webster, [1902] 2 Ch. 163, at p. 173, it is said: "If the owner of property clothes a third person with the apparent ownership and right of disposition thereof, not merely by transferring to him, but also acknowledging that the transferee has paid him the consideration for it, he is estopped from asserting his title as against a person to whom such third party has disposed of the property and who took it in good faith and for value."

The only possible distinction to be drawn whereby the present case would not fall within that proposition is, that the consideration given in the transfer is $1, but that is stated to be the amount of the consideration for the transfer,

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and the receipt is acknowledged. The evidence shews that the transfer is from a wife to her husband, given after a purchase by him of property, for the purpose of securing the vendors, and there would consequently be nothing in the fact of the consideration appearing as $1 to suggest any reason for inquiry.

The intention of the transferor as to the extent of the security appears to me to be absolutely immaterial, it being at variance with the reasonable conclusion to be drawn from the transfer and not having been communicated to the plaintiffs.

The evidence as to the reason for the non-production of the duplicate certificate of title is not as satisfactory as one would like, but the witness says he has no recollection about it. One can quite understand, however, that there being a transfer from wife to husband given to enable him to secure the property, the plaintiffs might not unreasonably have supposed that the duplicate certificate of title would be delivered if required, even supposing nothing was said about it at the time. It does appear, however, from the evidence, that this duplicate certificate was delivered from the land titles office to the defendant about a month after the date of her transfer; and at that time it was probably in that office, which might account for its non-production, it being as useful for the plaintiffs there as if in their own possession. Having held the transfer, as they had, for nearly a year, without any intimation that it meant anything other than it appeared on its face to mean, the plaintiffs made a settlement with the transferee, taking the value of the property transferred as being part of the consideration, and taking a transfer from the transferee, relying on the other transfer as giving him the right to pass the title to them.

Under these circumstances, I think the defendant should not now be permitted to say that the transfer she gave meant anything other than what it purported to mean, and that she should be required to deliver up her duplicate certificate to enable effect to be given to it.

SCOTT, J., concurred.

STUART, J.:—It seems to be clear that under our system of land titles a transfer executed in accordance with the Act does not pass the legal estate in the land until registered. The purchaser who holds the transfer may have paid the full purchase-price, as in Wilkie v. Jellett, 2 Terr. L. R. 149, and

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in such case he becomes the beneficial owner—no real interest, but only the bare legal estate, remaining in the vendor. In the judgment delivered in Wilkie v. Jellett, in the Territorial Court en banc, it was said: "A transfer not under seal would not, apart from the Territories Real Property Act, pass any title; and it, being a creature of the statute, can become effectual formally to pass the estate only when it is duly registered." See also Hogg, pp. 4, 901. The same must, I think, be the rule under our Land Titles Act. If the registered owner, instead of receiving the full purchase-price, merely executes the transfer for a limited purpose, without receiving any real purchase-money, the legal estate must remain in him; and, as between him and the transferee, the beneficial interest will be determined by the actual relationship or bargain between them. If the facts are, as held by the learned Judge whose decision is appealed from, that the defendant here, instead of getting any real consideration for the transfer, simply executed it and handed it to her husband so that he could deposit it with the plaintiffs as security for the second payment of $400 only, then the equities existing between her and him were that she was not merely the owner of the legal estate, but had herself a beneficial or equitable interest in the land, namely, the whole beneficial interest subject to the charge in favour of the plaintiffs, assuming that such a charge was ever properly created, to secure that payment; and that, upon that payment being made, the whole beneficial interest would revert to her. If the transfer from the defendant to her husband passed no legal estate, as it clearly did not, then the transfer from the husband to the plaintiffs could pass no legal estate, but only a beneficial interest, as the husband then held, just as an execution registered against the husband's lands would have attached only upon such beneficial interest as the husband held at the date of its registration. It seemed to be assumed in the argument for the respondents that the first transfer had passed the legal estate to the husband, that the second transfer had passed it on to the plaintiff, and that all they had to do was to insist on the Registrar calling in the certificate in order to effect a formal registration. But the real situation is, that the legal estate always remained in the defendant, coupled also with a serious beneficial and equitable interest; and, unless the mere equitable interest, if any, of the plaintiffs can be shewn to be entitled, upon some equit-

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able ground, to be given priority over that of the defendant, coupled as it is with the legal estate, then the defendant's interest must prevail.

The case is, indeed, peculiar. It is a question whether the husband was pledging or intending to pledge an estate of his own or not. Whatever his intentions may have been, he certainly had no legal estate to pledge and no equitable estate either, because he had paid no money to his wife at all. The transfer conveyed to him neither the one nor the other. The defendant, instead of handing him her certificate of title, which indeed she did not have in her possession until some months afterwards (a fact not adverted to in the argument), gave him a transfer which conveyed no interest to him whatever, and authorised him to deposit that as a security. What effect then are we to give to the transfer? The respondents, no doubt, contend that she thereby purported to transfer her estate in the land to her husband. But the trouble is, that the transfer does no such thing, has, in fact, no such legal effect, which the plaintiffs must be held to have known at the time. What then did the transfer do? In my opinion, it did little more than would have been done by a letter from her to her husband saying, "I intend to transfer my legal estate in this land to you." I have no fear of the result of such a view, because, where the transferee has given real consideration, as in Wilkie v. Jellett, he acquires a beneficial interest, and the transfer becomes, as the judgment in that case points out, the evidence that such an interest has passed, and amounts to an agreement to that effect. See the sentences already quoted from that case, 2 Terr. L. R. p. 149, where it is said: "The transfers given in the other cases are after all little, if anything, more than agreements binding on the vendor," i.e., until registered under the Act.

Can it be said, then, after all, that an equitable mortgage can be created in such a way? Once again, I emphasise the question, whose estate was being mortgaged or pledged? If it was the husband's, he clearly had none to pledge or mortgage. If it was the wife's, then, was any title deed of hers deposited at all? Clearly not. The transfer from herself to her husband was no part of her muniments of title. So far from shewing any title in her, it actually speaks of a transference of her title to her husband, but it does not, however, effect such transference. Examine the matter as you will, I cannot see that the defendant did any-

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thing more than at most give a written expression of intention to transfer her legal estate to her husband, and say verbally to him, "You may pledge this agreement I give you as security for your debt." It is impossible to hold that this is an equitable mortgage by means of the deposit of title deeds. No title deeds of the defendant were ever deposited.

To meet a barely possible contention, I would add that, while it is possible that a purchaser under a real agreement of sale may pledge that document as security for a debt, and so mortgage equitably whatever interest he has, still here, I repeat, the husband Huxley had no equitable interest to pledge.

Even if there had been an equitable mortgage created, it is still not so very easy to see why the plaintiffs' equity would be higher than that of the defendant. The facts of the case do not seem to have been presented to the Court on the argument with absolute accuracy. The plaintiffs sold the tin-shop and stock in trade to the defendant's husband for $4,400. A chattel mortgage was taken by the plaintiffs for the full purchase-money, but $400 in cash was paid on account of the mortgage at the time of the making of the mortgage. The mortgage is dated the 12th November, 1909. An additional $400 was payable under the mortgage on the 20th December, 1909, and then the balance was to be paid in annual instalments of $500 each. It was assumed upon the argument—by myself at any rate; I cannot speak for the other members of the Court—and it is indeed so stated in the judgment appealed from, that, at the time the mortgage was given, which was, no doubt, the date of the sale, the purchaser, the defendant's husband, deposited with the plaintiffs as further security the transfer of the lot of which the defendant was registered owner, from the defendant to him. This does not seem to have been the true situation. The transfer in question is dated the 2nd December, 1909, that is, some three weeks after the date of the mortgage. Mr. Adams, the secretary-treasurer of the plaintiffs, is hardly correct, I think, when he says in his affidavit that "the Acme Company Limited sold to the said W. R. Huxley the tin-shop business carried on by the Acme Company Limited, and the said transfer was handed to the Acme Company Limited by the said Huxley at that time as part security for the purchase-price of the said business."

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Besides the evidence furnished by the discrepancy of three weeks between the dates of the chattel mortgage and the transfer, there is the evidence of Adams on the hearing, wherein he says: "Well, we sold the Acme tin-shop to W. R. Huxley, and we obtained the chattel mortgage on the goods that we transferred to him and we asked for further security, and these transfers were handed to us, as further security, in addition to the chattel mortgage that we already had." This also is corroborated by the defendant's evidence, wherein she says: "Well, I gave it to him at the time—well, it wasn't at the time he went into the business with the Acme Company; it was a little while afterwards, about a month, I think, afterwards."

It is true that Adams says that "at the time the chattel mortgage was signed it was agreed that the transfer should be given to us, and two or three days later, I suppose, they handed it over." Aside from the evident inaccuracy as to the length of time, which must have been about three weeks, instead of "two or three days," it does not appear anywhere that the defendant was a party to this agreement. It is admitted that she was not present, and the agreement was evidently with the husband and not with her. There is no evidence either that she had yet authorised her husband to agree to deposit the transfer.

From all this it is clear that the transfer was deposited, not as a present security for the unpaid purchase-price at the date of the sale, but subsequently, and only as additional security for a debt already existing, i.e., for a past indebtedness.

There is no evidence that the plaintiffs surrendered any other security as a consideration for the deposit of the transfer. There is no evidence that they refrained from exercising any right they might otherwise have enforced. The chattel mortgage is not before us, and we do not know, indeed, whether or not it contained any clause giving the plaintiffs the right to seize at any time before the maturity of the debt. The $400 due on the 20th December, 1909, was paid, and nothing more was due for a year. It is true that the evidence is, that a seizure was made in October, 1910, before the next yearly payment was due; but I am unable to see how the mere fact of seizure at a certain time can be taken as evidence against Mrs. Huxley that the mortgage in fact gave them a right to seize. There is, in any case, no evi-

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dence whatever that the deposit of the transfer in fact led to a refraining from seizure, or that it induced the plaintiffs to alter their position in any way except at the final settlement. In view, moreover, of the evidence of Adams, who endeavours to give the impression that the transfer was deposited at the beginning, it is abundantly clear that the deposit did not induce the plaintiffs to refrain.

In Am. and Eng. Encyc. of Law, vol. 23, p. 491, it is stated: "By the prevailing weight of authority, a conveyance or mortgage taken from the debtor merely to secure the creditor for an existing debt, no extension of time of payment being given and no present consideration of any kind being advanced, does not constitute the creditor so secured a purchaser for value."

Up to this point, therefore, I think the plaintiffs took the transfer, whatever it may have been worth, subject to all equities existing between the defendant and her husband.

Then later on, in October, 1910, the plaintiffs found the stock depleted, and entered into possession and closed Huxley out. They took all the chattels there were. They took an assignment of the book-debts and a transfer of another lot not here in question. They took also a transfer from Huxley of the lot in question, and, having got everything it was possible to get, and without releasing any security, or making any cash payment, the evidence is, that they merely released Huxley from his liability.

Even, therefore, if there had been an equitable mortgage, it seems to me to be clear that the plaintiffs could only have the advantage of being purchasers for value and without notice, because they did, at the end, release the husband from a liability, that is, because they accepted the transfer as a part payment of a debt, and, having received it along with other property, accepted it as payment.

There is authority for the proposition that the simple release of an antecedent liability is sufficient to constitute the person who makes such release a purchaser for value without notice within the equitable rule. See Am. & Eng. Encyc. of Law, vol. 23, p. 491; Moore v. Kane, 24 O. R. 545. I do not think it necessary to examine the correctness of this rule, because, even accepting it as sound, I cannot see that, in the circumstances of this case, it will help the plaintiffs in any way. The inference which, I think, must be drawn from the evidence is, that they know that it was the defend-

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ant's property which was in reality being pledged to them. It is true that Adams in his affidavit swears that "the company had no knowledge that no consideration had passed from Effie D. Huxley to her husband, if such was the case, or that the transfer was held by W. R. Huxley in any other capacity than as owner for value." But I am afraid I must take the liberty of doubting the absolute accuracy of this statement. Adams swears that the transfers were merely promised at first. Now, if the husband already had them in his possession, there was no need to wait three weeks for them. I think there must have been some explanation given by Huxley of the delay. He must have promised to get the transfer from his wife. The fact that it was not executed for three weeks afterwards was known to Adams or the company, because the date is on the transfer. How did they suppose Huxley got it? They could not have supposed that he paid his wife value for the lot, because they must have wondered why such a payment could not have been made to them directly if the husband had any money to spend. It may be suggested that value might have been given by the husband long before the signing of the transfer, and that Adams may not have had any reason to suppose otherwise. But I simply draw another inference from the evidence. The transfer mentions $1 as the consideration. It was deposited after the 2nd December by the husband, in pursuance of a promise made three weeks before, to give further security for a debt of his own. The transfer was from a wife to a husband. All these circumstances convince me that the company knew that the wife was in reality giving security for her husband's debt. They had what they, no doubt, thought was a conveyance from her, but a conveyance as security only. Yet they undertook to turn that supposed conveyance, known to them to be conditional only, into an absolute one, without reference to her. In effect, they foreclosed what they thought was a mortgage without notice to the mortgagor. There is no evidence whatever that the defendant took part in the settlement or knew of it or consented to it. There is no evidence that her husband was her agent for that purpose. What evidence there is tends to shew that she was not a party to it and did not assent to it. If, before making the settlement, before deciding to treat her supposed conveyance as absolute, they had notified her of their intention, they would then have learned

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of the rights which she claimed to have, and, if they had then released the debt, they would have done so with their eyes open.

It is contended, however, that the defendant, by executing the transfer in her husband's name, and leaving it in her husband's possession, thereby represented that he had full power to deal with the property, and that she no longer had any interest in it, and this, I apprehend, is the real ground upon which the judgment appealed from proceeds.

A very close analogy to a transfer under our Land Titles Act is furnished by a transfer of shares in a company. In Shropshire Union Railway and Canal Co. v. The Queen, L. R. 7 H. L. 496, one Holyoake, a director of the defendant company, held, with the company's knowledge and permission, share certificates in his own name for shares in the company, but they were held in trust for the company itself. Holyoake deposited the certificates, in breach of the trust, with Robson, as security for advances, and had signed memoranda declaring the shares to be his own property, and promising to execute a legal mortgage of them. The executrix, the plaintiff, sued for a mandamus to compel the company to register her as the holder of the shares. She succeeded in the Exchequer Chamber, but failed in the House of Lords, who restored the original judgment against her. The House of Lords held that the mere fact that the company had permitted its shares to stand in the name of Holyoake, who was the legal owner by virtue of the certificate, did not preclude them from setting up a trust of which the equitable mortgagee had no notice.

Now, can it be said that the defendant here did anything more than the company did in that case? The company issued a certificate certifying that Holyoake was owner of the shares, but the Court said that every one ought to know that a person may be legal owner and yet not beneficial owner, and that there was not any such representation as would preclude the company from asserting its equitable right against another who had not a legal estate, but only an equitable right.

The case of Ortigosa v. Brown Janson and Co., 38 L. T. 145, is also, I think, much in point. One Ortigosa owned beneficially and was registered owner of 600 shares in a company. He applied to S. for an advance. S. demanded the security of a transfer of the shares. O. executed a trans-

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fer, stating the consideration to be £1,500, but not acknowledging the receipt of it, and deposited his certificates. O. received no money by way of advance at all. S., in fraud of O., deposited the certificates with, and executed a further transfer to, the defendants, who were his creditors to a large amount. But the defendants never registered their transfers, and O. remained the legal owner. Hall, V.-C., held that O. was entitled to an order for the delivery up of the certificates. He relied strongly upon Shropshire Union Railway and Canal Co. v. The Queen, and quoted Heath v. Crealock, L. R. 10 Ch. 33, where the Court said: "It is a cardinal rule of this Court that if a purchaser, however honest, on the completion of his purchase acquires a defective title, that defective title this Court will not allow to be strengthened either by his own fraud or the fraud of another person." In the present case, upon the facts found by the trial Judge, and fairly supported, I think, by the evidence, the husband acted in fraud of his wife. The Vice-Chancellor also said: "It has been argued that Brown Janson and Co. have an equity as against the plaintiff by reason of his having executed the instrument of transfer to Smithers, and intrusted him with the certificates, it being said that he was thus enabling him to represent himself as having been purchaser and being owner of the shares in question. It appears to me that there are not circumstances existing in this case to deprive the plaintiff of the benefit of his legal and equitable title or either of them. His equitable title was to have the instrument of transfer treated as remaining operative only until the plaintiffs' drafts were met, such equitable title being pre-existing as regards any title of Brown and Co. The conduct of the plaintiff in executing the instrument of transfer and delivering the certificates to Smithers, upon the terms mentioned in the letter, was not, in my opinion, misconduct, fraud, or negligence." He refers also to the fact that the defendants, who claimed under the second transfer, admited in their evidence that they looked upon the purchase-price stated in the first transfer, £1,500, as only formal, which presents another point of analogy to the present case, where the purchase-price named was on the face of it formal.

Another very analogous case is that of Carritt v. Real and Personal Advance Co., 42 Ch. D. 263. In that case Scoley owed Carritt money. Scoley gave a deed of assignment of certain leaseholds already subject to mortgage to one Chuck,

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a clerk of Carritt's, which was complete on its face, and disclosed no trust. In reality it was to be held as security for the plaintiff, and a secret deed of trust was executed by Chuck, which set forth the real relationship of the parties. Chuck was given possession of the deed. In fraud of Carritt, he pledged it to the defendants as security for an advance. Chitty, J., refused to postpone Carritt's claim to that of the defendants. He said: "The law allows a man for convenience, being the absolute owner, to take a conveyance of land, or a transfer of stock or an assignment of a lease, or indeed any other property, instead of to himself, to a trustee, to hold for him; and, though it may not be prudent to allow the indicia of title—the title deed, the stock certificate, or the like—to remain with the trustee, yet it is clear law that the deeds or certificates of title or other indicia of title are lawfully and rightfully in the custody of the trustee. I say it is not altogether prudent for the equitable owner to leave the deed in the hands of a trustee, because in many cases the trustee has the legal estate also; and, taking the case, for instance, of stock, he can make a perfect assignment of stock to a purchaser for value, who takes it without any notice and thereby obtains a good title as against the equitable owner for whom the transferor held the stock merely as trustee" (the learned Judge here means, of course, that the purchaser gets the legal title). "But the cestuis que trust, the absolute owner, has at least some safeguard, in a case of that kind, if he keeps the certificate in his possession, because the trustee then has a greater difficulty in procuring the transfer to be registered in the books of the company. Still, I go back to the proposition that there is no negligence on the part of a cestui que trust in allowing all the instruments of title to remain in the custody of the trustee." The learned Judge points out, also, that the defendants did not investigate the title; and, if they had done so, the trust would have been disclosed. This decision is approved by the Court of Appeal in Taylor v. London and County Banking Co., [1901] 2 Ch. 231, 262.

I cannot see that the defendant here made any stronger representation than was made by the plaintiff in Ortigosa v. Brown Janson and Co., or indeed by the appellants in Shropshire Union Railway and Canal Co. v. The Queen, when they certified that Holyoake was the owner of the shares. The present case is stronger in the defendant's favour than

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any of the three cases I have cited, because she remained all along the owner of the legal estate, and retained in her own possession and control the certificate of title: and this circumstance, I think, constitutes the essential point of distinction between the present case and Rimmer v. Webster, [1902] 2 Ch. 163, upon which the respondents rely, and upon which the judgment below was based.

In Rimmer v. Webster, the plaintiff had conveyed his legal estate to Hall, his fraudulent agent. Farwell, J., held that the defendant was not bound by a limitation placed upon the agent's authority, and distinguished Shropshire Union Railway and Canal Co. v. The Queen, on the ground that there the agent-trustee who held the legal title had no authority to deal with the shares at all.

But in the present case, I am of opinion that the retention of the legal estate, and of the evidence of it furnished by the certificate of title, was in itself sufficient notice of a limitation upon the husband's authority. So far from the transfer being a representation that the husband could pledge the legal estate, it was, on the face of it, notice that he had no legal estate to pledge, and it furnished the very gravest reasons for suspecting that he had no equitable estate to pledge either.

In my opinion, it would bring about an altogether too dangerous inroad upon the protection intended to be afforded by our Land Titles Act, and the certificates issued under it, if a registered owner who retains the certificate of title in his own possession, but, for a limited purpose, places an unregistered, and, until the certificate is forthcoming, unregistrable, transfer in the hands of an agent for a limited purpose, were to be exposed to the danger of losing his legal estate and any equity he may possess through the fraudulent excess of authority on the part of the agent to as full an extent as if he, the owner, had absolutely conveyed the legal estate to the agent and left it entirely in his hands without visible restriction. I am glad to be able to conclude that such is not the law.

Indeed, I am quite prepared to go further. Even if the husband did not exceed his authority, even if the defendant agreed that he was to give security for the whole debt, the plaintiffs are, I think, driven into a dilemma. The case of Rimmer v. Webster proceeds on the basis of agency. Now, if the plaintiffs' contention is based on the assumption that

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Huxley was his wife's agent, then the idea must be that it was her estate that he was pledging. We here come back again to the insurmountable obstacle in the plaintiffs' way, viz., that Huxley did nothing which could be called a pledge or equitable mortgage of his wife's estate. No title deed of hers was deposited, as I have before pointed out. It is said that the transfer constituted a representation of some kind, but I am not aware that an equitable mortgage can be created by the deposit of a representation, or by a mere representation alone, hanging by itself in the air.

Beyond this, we have nothing more than verbal agreements, whatever they may have been. The defendant may have verbally told her husband that he could pledge her estate, and the husband may have verbally done so, but I know of no authority for the creation of an equitable charge in such a fashion.

Finally, sec. 44 of the Land Titles Act makes the certificate of title conclusive evidence of title, except in the case of fraud in which the owner has participated or colluded. There is no finding and no evidence of fraud on the part of the defendant. On the contrary, the certificate is here invoked, not to cover, but to defeat a fraud, in which the plaintiffs, it is true, did not participate, but of which they are seeking to get the benefit.

The appeal should be allowed with costs, the order below set aside, and judgment entered dismissing the application with costs.

SIMMONS, J., concurred.

The Court being divided, the appeal was dismissed.

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## ALBERTA.

FEBRUARY 3RD, 1912.

SUPREME COURT EN BANC.

## LEONARD & SONS v. KREMER.

*Sale of Goods—Delay in Delivery—Contract — Inability to Deliver in Time—Excusing Clause—Construction—Onus —Failure to Deliver—Cause of Delay—Damages—Loss of Profits.*

In an action for the price of a boiler and certain other machinery sold by the plaintiffs to the defendant, the defendant counterclaimed for damages for delay in delivery. In the contract of sale, which was created by the plaintiffs' acceptance of an order given by the defendant, the following provision was made: "If for any reason you are unable to fill this order or deliver the goods at the time stated the undersigned will not in any way hold you responsible for damages." There was no evidence of the plaintiffs' inability to deliver at the time stated:—

*Held* (SIMMONS, J., dissenting), that inability meant more than failure; that mere failure was no evidence of inability; and that, under the terms of the provision quoted, the onus was upon the plaintiffs to shew that they were unable to deliver at the time stated.

*Held*, also (SIMMONS, J., dissenting), that, upon the evidence, the delay in getting the machinery into operation was not occasioned by the defendant not having a governor, which was not included in the contract in question; and, in any case, the delay in the delivery of the governor was the delay of the plaintiffs, from whom the defendant ordered a governor after he had ordered the boiler.

*Held*, also, that the defendant had established a loss of profits for 18 days by reason of the delay, estimated at $40 a day, according to a notice given by the plaintiffs to the defendant, and was, therefore, entitled to recover $720 damages upon his counterclaim.

Judgment of HARVEY, C.J., reversed.

An appeal by the defendant from the judgment of HARVEY, C.J., in favour of the plaintiffs for the balance of their claim, after deducting $100 for certain attachments not supplied with the boiler and certain other machinery, the price of which formed the subject-matter of the action, and dismissing the defendant's counterclaim for damages for delay in delivery.

The appeal was heard by SCOTT, STUART, BECK, and SIMMONS, JJ.

John Barnett, for the defendant.

C. F. Adams, for the plaintiffs.

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BECK J.:—There seems to be no ground for disturbing the learned Judge's decision upon the plaintiffs' claim. I think, however, that the defendant is entitled to judgment for some damages on his counterclaim. The reasons stated by the learned Judge for dismissing the counterclaim are: first, that the terms of the contract exclude the defendant's right; and, secondly, that the delay was occasioned by reason of the defendant not having a governor, which was not included in the contract in question.

As to the first ground: the contract, which was created by the plaintiffs' acceptance of an order given by the defendant, contains the following provision: "If for any reason you are unable to fill this order or deliver the goods at the time stated the undersigned will not in any way hold you responsible for damages." This is the provision to which the learned Judge referred as excluding the plaintiffs' liability. He seems, however, to have overlooked the fact that there is no evidence whatever of the plaintiffs' inability to deliver at the time stated. Counsel for the plaintiffs contended that no such evidence was necessary; that either "unable" means nothing more than "fail," or nondelivery at the time is primâ facie evidence of inability. I think this contention is not sound, that inability means more than failure, and that mere failure is no evidence of inability; that, under the terms of the clause, the onus lay upon the plaintiffs to shew that they were unable to deliver at the time stated, which they might have done by shewing, for instance, a strike of their own or the railway company's employees, inability to obtain railway cars, an accident in their works, etc. See Elkin v. Janson, 14 L. J. Ex. 201.

As to the second ground: it is true that the defendant, during his cross-examination, in reply to a question from the trial Judge, made the bald answer "No" to the question, "Could you have gone ahead without a governor?" But, while he was in the witness-box on this occasion, the point was not again referred to. Later, Watson, the Government Inspector of Boilers, was called and with regard to a governor gave evidence as follows:—

"Q. What would you say as to the necessity of a governor for running an engine? A. It would depend on what kind of work you were putting the engine to. Certain kinds of work you are compelled to have a governor.

"Q. For example? A. You could not do electric lighting without a governor.

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"Q. Could you run a brick plant without a governor? A. Yes, I think so.

"Q. What has been your experience with governors? You have had a fairly wide experience? A. I have run them for weeks and weeks without a governor.

"Q. What is the purpose of a governor? A. It is to have the engine running at a uniform speed, regardless of the load.

"Q. And is there any way of accomplishing that without a governor? A. Throttling.

"Q. What do you mean by throttling? A. Your valve shut-off valve at the engine. You can regulate the speed by that, if your load were varying. You would need a man to attend to that, though.

"Q. You say you have run an engine for weeks without a governor? A. Yes, there are all kinds of engines. A locomotive never has a governor. An American engine has not. There is any amount of times the bolt of the governor may break, and you don't stop to fix it."

Later he said: "It is not necessary to have a governor to operate the engine."

The defendant was recalled and gave evidence as follows:—

"Q. Concerning that boiler, was it in the same condition at the time of Mr. Watson's inspection as when you set it up? A. Yes, the boiler, exactly the same.

"Q. Had there been any changes? A. No changes whatever.

"Q. Did you know an engine could be run without a governor? A. Yes.

"Q. Had you ever done so? A. Yes."

He was not cross-examined at all, nor was any reference made to his earlier contradictory answer to the trial Judge. The defendant's answer to the learned Judge, that he could not go ahead without a governor, is, it seems clear, not true; but, from a perusal of the whole evidence, I fancy what he meant was, that he did not intend to operate his plant without a governor. I think it must be taken as established that a governor was not essential for the operation of the plant for the purpose of the defendant's business of brickmaker, which was the business he was carrying on, to the knowledge of the plaintiffs, though I am inclined to believe that the defendant did not intend to use any other



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available expedient in lieu of a governor from these same plaintiffs; he got another elsewhere on account of their delay in filling his order for it. I, therefore, think that the absence of the governor was not the real cause whereby the defendant was prevented from getting his plant into operation.

In any case, the delay in the delivery of the governor was the delay of the plaintiffs. A part of the correspondence about the governor was as follows. On the 9th April, the defendant writes saying, "Give me your best price on governor with 2½ steam connection." The plaintiffs, on the 12th April, write: "Re governor. We could supply you with one 2½ Evans patent noiseless governor for the sum of $30. This is the engine we use on our Leonard and Clipper engines. We would be pleased to supply you with one of these governors." The defendant, on the 19th April, writes ordering the governor. On the 26th, the plaintiffs' agent replies saying he has sent in the order for the governor, "which will come up with the boiler." This last statement, no doubt, was relied upon by the defendant; and, when the boiler came without some of the admittedly necessary attachments comprised in the order for the boiler, the absence of which admittedly delayed its being put into operation, no occasion arose until, or at any rate until shortly before, these other attachments had arrived, or other expedients had been adopted, for the defendant to decide what course he would take on account of the absence of the governor—whether he could do without it, adopting some other expedient, or, as he eventually did, procure one elsewhere.

As to the damages: the plaintiffs, at the time the order for the boiler was given, were notified by the defendant that he had contracted for a sale of all the brick he could manufacture during the season of 1910. He proves a contract at $8.75 a thousand, a price less than the market price. I think he has established a loss of profits for 18 days.

On the argument, his counsel finally stated his claim to be for 34 days from the 10th May to the 18th June, at $52 88 per day; but, on the 9th May, the defendant wrote to the plaintiffs saying: "I am and will be losing $40 per day until that boiler is in steaming shape." I think that, in consequence of this notice, $40 per day is the rate which should be charged against the plaintiffs; that makes $720.

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The plaintiffs' claim is $565.30, from which $100, allowed by the trial Judge for parts not supplied, should be deducted, leaving $465.30. This deducted from $720 leaves $254.70.

In my opinion, the defendant is entitled to judgment for this amount, with the general costs in the Court below and costs of the appeal.

SCOTT, J., concurred.

STUART, J.:—The order which the plaintiffs accepted, and which therefore contained the contract between the parties, stated that the goods were to be delivered "on cars at Calgary, Alta., on or about the 28th April, 1910." It also stated that "all piping, valves and fittings, etc., are covered by this lien"—that is, the lien given in the contract.

The bulk of the goods were placed on the cars in Calgary on the 18th May, i.e., twenty days later than the date agreed upon. When they arrived at Innisfail on the 23rd May, a steam flange, which was an essential part of the boiler, was found not to be there at all. The defendant had to make a paper template of it, and, at the request of the plaintiffs' Calgary agent, sent this to Calgary, so that one might be made there. This was not received at Innisfail till the 2nd June. There is no question here of any change in the size of anything. The steam flange simply was not there at all, and had to be manufactured. This, however, did not cause a further delay of ten days, as would at first appear, because the flange was not needed at once. The boiler had to be set up and some work done on it before the defendant was ready to put the flange on. From his letter of the 27th May, in which he says, "The boiler will be finished to-morrow and ready for action," I gather that he had, up to that time, suffered no real delay merely by the absence of this flange. I think, as he got the flange on the 2nd June, only three days should be added, which makes 24 in all. Then, on the 2nd June, he, for the first time, discovered that the safety valve flange did not fit the corresponding flange on the boiler, to which it was to be attached. I do not think he was to blame for not discovering this sooner, because I gather that he needed the steam flange before he could go on to adjust the safety valve flange. I can see no reason

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for blaming the defendant for this mistake. It is true that the steam connection on his engine was only two inches in diameter, and that he points this out in his letter of the 9th April, where he inquires as to the diameter of the steam connection of the boiler. The answer given by Stewart, in his letter of the 12th April, was, that the boiler outlet was 3½ inches.—"But this can be reduced to 2½ inches if required." It is clear, however, that there was no change made in the boiler outlet on this account, because, when it came, it was neither 3½ nor 2½ inches, but 3 inches, as set forth in the affidavit forwarded to be filed with the Government. What Stewart was referring to, when he spoke of reducing the size, was a device by which, by means of a joint, the size of a pipe may be reduced on its way from one outlet to another. All this, however, is no reason why the one flange should not correspond with the other to which it was to be bolted. These, at any rate, should have fitted each other. The plaintiffs knew that one should fit the other, and that they were intended to be bolted together. Yet, when the defendant proceeded to do it on the 2nd June, it could not be done, and he expresses his reasonable astonishment in his letter of the 2nd June, wherein he asks, in popular language, "What do you know about that?" He sent the flange at once to Head & Co., of Calgary, and also wrote to Stewart that he had done so. That may have been a foolish thing to do, but Stewart was informed as to where it had been sent, which, in my opinion, covers up any fault. Stewart contented himself with merely inquiring for it at Head's, and then writes back that it had not arrived. His company were in default; and, in my opinion, he could have undertaken to locate the flange, just as he should have done if it had been expressed to himself and had not arrived. Yet, so far as the evidence goes, he made no attempt to do so. In such circumstances, the plaintiffs are not entitled to criticise with too much strictness the defendant's method of repairing a default which was theirs and not his. The defendant got to work on the 18th June, which was sixteen days' further delay. In all, it would appear to me that the total delay is made up as follows: 28th April to 18th May, twenty days; 30th May to 2nd June, three days; 2nd June to 18th June, sixteen days; or thirty-nine days in all. From this, however, should be deducted some time which must have been spent in any case in fixing the boiler and making connections

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over and above the period between the 23rd May, when the boiler arrived, and the 30th May, when the defendant was ready to put on the two flanges, one of which was missing and the other a misfit, which I have already allowed. From the evidence, I should infer that four or five additional days should be allowed, which would reduce the delay to thirty-four days, the number finally claimed by Mr. Barnett in the argument before us. I think, however, it is fair that a further allowance should also be made. Between 5th June, the date of the defendant's last communication with Stewart about the misfitting flange, and the time he took the train to go and see about it in Calgary, he seems to have waited, doing practically nothing. For a man who seeks damages at $40 a day for delay, I think he should have been somewhat more prompt in minimising the damage, and I would deduct, say, six days further. This leaves twenty-eight days, which, I think, is the right period, unless the plaintiffs are entitled to a reasonably further time after the 28th April, in view of the use of the expression "on or about" in the order. I have been unable to discover any case in which an interpretation is put upon the word "about" when it refers to time. But there is a case of Cross v. Eglin, 2 B. & Ad. 106, where the contract was for the sale of "about 300 quarters" of rye, "more or less." Delivery of 350 quarters was tendered. Parke, J., and Patteson, J., held that it lay upon the vendors to shew that such an excess above the quantity named was in the contemplation of the parties. In the present case the plaintiffs' agent knew, when he took the order, that the boiler was needed for the opening of the brick-making season. He was also afterwards warned by the defendant that prompt delivery for the opening of the season was required. I am unable to conclude that the letter accompanying the order is sufficient to constitute a variation of the contract or of its real meaning. The defendant signed the order as drawn by Stewart, and must, I think, abide by the true interpretation of it. The defendant says he would not have been able to start in any case till the 8th May; but, even if there had been prompt delivery on the day named, the defendant would have needed a good deal of intervening time to set up his machinery. For myself, I do not think the plaintiffs ought to expect, in the circumstances, to be allowed more than ten days, at the outside, after the date named. They have given no evidence to justify any larger

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allowance. I, therefore, think only eighteen days' delay should be charged against them.

The order contained a clause reading as follows: "If for any reason you may be unable to fill this order or deliver the goods at the time stated the undersigned will not in any way hold you responsible for damages."

The learned Chief Justice, who tried the case, thought that this clause, even in the absence of any evidence shewing inability on the part of the plaintiffs, was sufficient to defeat the defendant's counterclaim for damages. With great respect, I am unable to view the matter in that light. One does not need to assume wilful delay on the part of the plaintiffs in depriving them of the benefit of this clause, in the absence of evidence. They may have been merely careless and dilatory. I do not think the clause is sufficient to throw the onus probandi on the defendant. The facts were not within his knowledge. If it were open to us to interpret the real meaning of the contract to be that the plaintiffs were merely to deliver "as soon as possible," which was the expression used in Attwood v. Emery, 1 C. B. N. S. 108, something might be said in favour of the view that the burden of proving that the goods were not delivered "as soon as possible" lay upon the purchaser; but, in the form in which the present contract stands, and in all the circumstances of this case, I have no doubt that the burden of proving inability lay upon the plaintiffs; and, as they offered no evidence, they cannot rely upon the clause.

I make no reference to the question of the governor, because I concur in the observations made in that regard in the judgment of Mr. Justice Beck, which I have read, and with which, upon that point, I entirely concur.

I also agree that $40 a day is the measure of damages that should be allowed, which will amount to $720. The plaintiffs' claim is $565.30. Deducting $100 from this for parts not supplied, as allowed by the trial Judge, and deducting the balance from the above sum of $720, we have the sum of $254.70, for which, I think, judgment for the defendant should be entered, together with costs of the appeal and of the trial.

SIMMONS, J. (dissenting):—This is an appeal from the judgment of the Chief Justice dismissing the defendant's counterclaim for damages for the delay of the plaintiffs in supplying to the defendant a boiler and attachments.

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The judgment in favour of the plaintiffs in regard to the defendant's claim for damages is upon the finding of fact that an attachment called a "governor" which was not included in the plaintiffs' contract with the defendant) and which was not got from the plaintiffs, was "approximately the last thing that was done to enable him to start work." There is also an intimation in the judgment appealed from, that, even aside from this, the defendant might not succeed on the grounds of remoteness of the damages.

The plaintiffs carry on at London, Ontario, the business of manufacturers of boilers and engines, and George Stewart, their agent at Calgary, visited the defendant at Innisfail and discussed with the defendant the kind of boiler the defendant required for his brick plant at Innisfail; and, after some correspondence between them, the defendant executed and delivered to Stewart the order, which is as follows:—

"To E. Leonard & Sons, Manufacturers of Engines and Boilers, London, Canada.

"Dated at Calgary, Alberta, the 28th day of February, 1910.

"Sirs:—You will please manufacture for the undersigned and deliver on cars at Calgary, Alta., on or about the 28th day of April, 1910, one 54" x 12" Return tubular boiler complete with all fittings, built for 125 lbs. steam pressure, 50' of 24" smoke stack and wire; one C. C. Penberthy injector, and one 3" x 2" x 3" steam pump, and piping to connect same, and suspension for rear end of boiler, which the undersigned agrees to receive, and to pay you therefor the sum of $744, in the following manner: $744

| | |
|---|---|
| Cash in hand when ready to ship ..... | $ 300 00 |
| My or our approved joint note due 6 months after shipment ..... | 222 00 |
| My or our approved joint note due 9 months after shipment ..... | 222 00 |
| | $ 744 00 |

with interest at the rate of 8 per cent. per annum on said purchase-money from the date of delivery of said goods. The above goods to be shipped via C. P. Railway to Innisfail, Alberta, or by such other route as you may direct, at the risk of the undersigned, on or about the time above-mentioned; but if for any reason you may be unable to fill this order or deliver the goods at the time stated the undersigned wil not in any way hold you responsible for damages.

"And the undersigned agrees not to countermand this order, and if the above machinery is not settled for by cash

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or notes within 20 days after shipment, according to "Terms of Sale," then the account shall become due, and the undersigned hereby agrees to accept and pay draft for the amount mentioned above.

"It is distinctly understood and agreed that the property and title to the goods so to be furnished by you to the undersigned is not to pass to the undersigned until you are fully paid the price therefore, and it is also distinctly understood and agreed that all piping, valves, and fittings, etc., are covered by this lien and for all repairs in connection therewith, and that the notes so to be given are to be held by you as collateral security in respect of such purchase-money. If default be made in payment of the said note or notes, or any of them, or of any renewal or renewals thereof, including all accounts for repairs in respect of said goods, or if the said goods be disposed of, or attempted to be disposed of, by the undersigned, or are seized in execution in respect of any debt due by the undersigned, or if the undersigned make an assignment for the benefit of creditors, or abscond or leave the said goods unprotected, or sell or attempt to sell the real estate of the undersigned, or any of them, or any part or parts thereof, then you are at liberty to take possession of the said goods and resell the same by public auction or private sale, crediting the undersigned with the proceeds only, less all expenses connected with such retaking and all repairs in respect thereof, including repairs for refitting said goods for the purpose of such resale, which you are hereby authorised to make for the purpose of such resale, and the residue of the price of such goods and said repairs, if any, shall at once become due and payable, and the undersigned in such case hereby agrees to pay the same, and such notes shall continue to be collateral security for the payment thereof.

"And the undersigned hereby declares that the provisions of the statute of Ontario 51 Vict. ch. 19, now ch. 149, R. S. O. 1897, intituled 'An Act respecting Conditional Sales,' shall not apply to this agreement, and you shall be at liberty to resell the said goods without any notice to me.

"And the undersigned hereby acknowledge having received a copy of this agreement.

"If an engineer is required, the charge to be $5 per day, and the railroad fare and board at cost.

"Remarks .....

"D. H. Kremer, Innisfail, Alberta."

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The order is dated the 28th February, 1910, and on the 24th February, 1910, the defendant advised the plaintiffs by letter that "I signed a contract yesterday to supply all the brick I can make in the season of 1910;" and on the 28th February, 1910, the defendant wrote Stewart enclosing the order, exhibit 1. and stating, "Now about delivery I would like to get this boiler sooner than stated in the order." In reply, Stewart, on the 28th February, 1910, wrote, "We will get this boiler put in hand for you at once and will try and have it brought up a little sooner than stated." On the 9th April, the defendant wrote to the plaintiffs at Calgary as follows:—

"Innisfail, Alta., April 9th, 1910.

"Leonard & Sons, Calgary, Alta.

"Dear Sirs: I would be much obliged if you could tell me what size steam connection will be on boiler. My engine is 2", and I would rather have it two and a half (2½"), if it is possible to change. Give me your best price on governor with 2½ steam connection. I am ready any time now for that boiler. I am setting engine now. A reply by return of mail will oblige,

"Yours truly,

"D. H. Kremer."

In this letter the defendant for the first time intimates to the plaintiffs that his engine is 2" and he would rather have steam connection 2½" if it is possible to change, and asks for price on governor and 2½" steam connection.

The plaintiffs replied by letter as follows:—

"E. Leonard & Sons, Manufacturers of Engines and Boilers, London, Canada.

"Geo. Stewart, P.O. Box 1315, Calgary, Alta.

April 12th, 1911.

"D. H. Kremer, Esq., Innisfail, Alta.

"Dear Sir: Your favour received, and in reply beg to say that the outlet on the boiler is 3½", but this can be reduced to 2½", if required.

"Please let us hear from you by return mail as to this,

"Re governor: we could supply you with one 2½" Evans patent noiseless governor for the sum of $30; this is the engine we use on our Leonard and Clipper engines. We would be pleased to supply you with one of these governors. Kindly let us hear from you and oblige.

"We beg to remain, yours respectfully,

"H. Leonard & Sons,

"Per Geo. Stewart."

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The defendant replied by letter as follows:—

"Innisfail, Alta., April 19th, 1910.

"Leonard & Sons, Calgary, Alta.

"Dear Sirs: Re Governor for engine, would say that I will take a 2½" Evans for $30. The boiler outlet would have to be reduced to 2½". I may want a short time to pay for this governor, which I hope would be satisfactory. You will find enclosed a pattern for governor to fit. Could you give me some idea about when the boiler would arrive? What would you advise (for use on engine) to shut engine down, say with a small rope 25 or 30 feet away, which would only be used in case of accident at brick machine. Some tell me the governor could be used, and others say a throttle valve. Would like to hear from you regarding this.

I remain, yours truly,

"D. H. Kremer."

On the 26th April, 1910, the plaintiffs replied by letter: "Your favour of the 19th inst. received, for which kindly accept our thanks; this would have been answered sooner, but the writer has been out of the city. Have sent your order in for the 2½" governor, which will come up with the boiler, and we expect the boiler to arrive here in about two weeks, as it will be shipped now in a day or so. We will try and navigate a little time for you on this governor. We note that you want the outlet made to 2½" on the boiler: this can be done by using a reducer. Re shutting down engine: we think you should have what is called a quick shut off throttle, or valve, for this purpose, as the governor will hardly do this."

The defendant made no complaint and no reference to the plaintiffs' notice in this letter that the boiler was expected in two weeks, although this was the 26th April, and the contract named the 28th April for the delivery of the boiler at Calgary, and on the 9th May, in reply to another letter of the plaintiffs of the 4th May stating that the boiler would be at Calgary in ten days, the defendant says: "Yours of the 6th inst. received, enclosing sworn to affidavit. I am pleased to hear that boiler has been shipped. Boiler not being here sooner has put me to considerable trouble. I am and will be losing $40 per day until that boiler is in steaming shape. I contracted for all my brick to be shipped to Calgary, and will not be able to fill contract. I hope you will rush boiler and help me get it as quick as pos-

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sible. Be sure that everything is correct and all on board before it leaves Calgary, so that I will have no delay when it arrives."

On the 18th May, the boiler was shipped from Calgary to Innisfail, and the pump shipped by local freight.

The claim for damages seems to rest practically upon two grounds: (a) the delay from the 28th April to the 17th May in the arrival of the boiler at Calgary; and (b) the absence of one of the parts of the boiler called a steam flange. This steam flange fits on to a nozzle flange on the boiler, and in the top of the steam flange is an opening in which is inserted the steam pipe by means of which the steam is conducted from the boiler to the engine. On the 23rd May, the defendant wrote to the plaintiffs at Calgary calling attention to the absence of the steam flange, and the plaintiffs had one made in Calgary and shipped to the defendant about the 28th May. On the 2nd June, the defendant discovered that the safety pop flange or safety valve did not fit the corresponding part of the boiler, and he sent it to William Head & Co., at Calgary, for alterations. Through some mistake at the express office apparently, it remained at the express office for some days; and finally the defendant went to Calgary on the 12th or 13th June and got this pop flange at the express office and took it to Sutor's foundry, and Sutor said he could not do anything with it, and the defendant then took it home and fitted it on the boiler by doing some chiselling. In the defendant's letter of the 2nd June to the plaintiffs at Calgary, advising them that he had sent the safety pop flange to William Head & Co., he says: "I am delayed any way on account of the governors so long as I get it as soon as they arrive." And, on p. 57 of the case, in answer to a question by the Court, the defendant says he could not have gone ahead without a governor. A governor was ordered on the 19th April from the plaintiffs; but the defendant, not being able to get it from the plaintiffs, got one from another dealer on the 14th June. The defendant commenced operations on the 18th June.

In regard to the defendant's claim under (a), namely, delay in shipment of twenty days, I am of the opinion that the clause of the contract, 'If for any reason you may be unable to fill this order or deliver the goods at the time stated the undersigned will not in any way hold you responsible for damages," fully protects the plaintiffs, in the

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absence of negligence or mala fides upon their part. It would clearly be upon the defendant, in the face of this exemption clause, to assert and prove negligence on the part of the plaintiffs as the cause of delay, and there is not the slightest indication in the evidence of either mala fides or negligence.

In Smith's Mercantile Law the effect of exemption provisions which are inserted in charters and bills of lading is somewhat fully discussed, and it is intimated that the Court will give full effect to them, even to the extent of giving relief by way of exemption from damages, where these clauses include exemption as to negligence of the carrier. See also Westport Coal Co. v. McPhail, [1898] 2 Q. B. 130. Also in British Columbia, etc., Saw Mill Co. v. Nettleship, 37 L. J. C. P. 235, Willes, J., says: "If this matter had been brought to the ship-owner's knowledge, not as mere information, but as the basis of liability, he would have rejected the contract, and it is absurd to contend that mere knowledge that the chattel is to be used in a specific manner is to fix the carrier, when, if it had been suggested that he was to be responsible, he would have rejected the liability if he had a chance." See also the remarks of Lord Esher in Hammond v. Bussey, 20 Q. B. D. 79, as to the application of the dictum in Hadley v. Baxendale, 9 Ex. 341—"Such damages as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it."

It seems to me that, in the clause of the contract above quoted, we have a clear unequivocal declaration of both parties that the plaintiffs are not to be liable for damages even though they know the defendant wants his machinery for a certain purpose at a named date.

The same principles seem to me also to apply to the matters raised under (b), namely, the absence of the steam flange and the subsequent misfit of the safety pop flange. Even if it were negligence of the plaintiffs in shipping the boiler without this part, it would seem that they had no difficulty in having one made in Calgary and shipped to the defendant in a few days. In regard to the misfit of the safety pop flange, I am not satisfied that the defendant was not the direct cause of this. On the 9th April, he wrote to the plaintiffs, and they replied by letter, and the defendant replied to them on the 19th April. This corres-

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pondence seems clearly to indicate that the defendant wished some modifications in regard to the size of the outlet on the boiler, in order to accommodate it to the engine to which the defendant intended attaching the boiler. The evidence of Watson, boiler inspector, is to the effect that the governor was not necessary to operate the boiler in connection with a brick-making machine. The defendant thought it was. On the 27th May, the defendant wrote to the plaintiffs: "The boiler will be finished to-morrow and ready for action;" and on the 2nd June he said to the plaintiffs that "he was delayed any way on account of the governors." At the trial he said he could not operate without the governor. It seems to me that the defendant must fail as to both grounds raised under (a) and (b). He has not brought home to the plaintiffs their assent to assume any liability for delays or defects such as occurred; and, secondly, he has not shewn that these were the natural proximate causes of the delay in commencing the operation of the machine.

I would, therefore, dismiss the appeal with costs.

*Appeal allowed;* SIMMONS, J., *dissenting.*

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## ALBERTA.

FEBRUARY 3RD, 1912.

SUPREME COURT EN BANC.

## MARSON v. GRAND TRUNK PACIFIC R. W. CO.

(TWO CASES.)

*Damages—Trespass to Land — Measure of Damages—Loss and Shrinkage of Live Stock—Loss of Profits—Evidence as to Minimising Damage — Onus — Special Damage—Pleading—Nominal Damages—Loss of Use of Land for Garden — Loss of Business—Special Circumstances—Costs.*

**The judgment of BECK, J., 17 W. L. R. 693, was varied by reducing the damages for loss of pigs and shrinkage by reason of the defendants' trespass upon the plaintiff's land, by which he was prevented from extending the boundaries of his corral, from $640 to $250.**

***Held*, that the obvious course for the plaintiff to adopt was to reduce the number of his pigs to the number which he had kept in**

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the previous year, in the same place, without loss, and without the necessity of extending the boundaries of his corral.

The rental value of the land could not be adopted as the measure of damages in such a case as this. In the case of land, as well as in the case of chattels, special damage arising from deprivation of use for special purposes may be pleaded and proven. The extension of a pig corral, already on part of the owner's property, to wider boundaries, so as to give greater accommodation, is not such a peculiar or unusual use as to relieve a trespasser from the duty of anticipating the probability of it. The damages are for loss of profits, and the fact of such loss is sufficiently certain.

The judgment of BECK, J., was further varied by reducing the amount allowed as damages resulting from the service of an abandoned notice to expropriate a lot of land belonging to the plaintiff, from $250 to $50; and by disallowing the nominal sum of $5 allowed for loss of business.

*Held*, that the plaintiff could not recover as special damage the anticipated profit on a crop of vegetables which he was prevented from sowing or planting.

Special direction as to costs.

Appeal by the defendants from the judgment of BECK, J., 17 W. L. R. 693.

The appeal was heard by HARVEY, C.J., SCOTT, STUART, and SIMMONS, JJ.

O. M. Biggar, for the defendants.

E. B. Edwards, K.C., for the plaintiff.

The judgment of the Court was delivered by

STUART, J.:—This is a story, not about pigs in clover, but about pigs in mud. The plaintiff owned a certain lot in the outskirts of Edmonton. He had the southern portion fenced in, and in 1907 had used this fenced portion as a pig corral, raising young pigs and feeding them until fit for sale. In the spring of 1908, he was using the same corral for the same purpose, the rest of the lot not yet being fenced in at all, but being open prairie. The defendants trespassed upon the unfenced portion, dug a deep cut for the railway through part of it, and covered a great deal of it with the excavated earth. The plaintiff says that he intended to extend his corral so as to take in the rest of the lot; but, by reason of the defendants' action, it was rendered unfit for this purpose, in consequence of which his pigs, which in 1908 were considerably increased in number, were confined in too narrow a space, so that the ground became filthy and unhealthy, whereby he lost a number of pigs by death, and the selling value of others was greatly decreased.

A reference was made to the Clerk at Edmonton to assess the damages. He estimated the damage suffered by

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the plaintiff at $640. Upon motion before Mr. Justice Scott to confirm this report and to enter judgment, the matter was sent back to the Clerk for further report, upon the ground that the plaintiff should have done all he could to minimise the damage, particularly by securing other land for his purpose. The Clerk took further evidence, and in his report disallowed the claim entirely, on the ground that, although the plaintiff had endeavoured to secure other land, he had not looked in the right direction and had not availed himself of land of his own which he might have used. Upon motion by the plaintiff before Mr. Justice Beck to vary this report, the learned Judge directed judgment to be entered for the plaintiff for $640, the original amount of damage found by the Clerk to have been suffered by the plaintiff, and this upon the ground that the burden was upon the defendants to shew that other suitable land was available for the plaintiff to rent, which they had not shewn, and on the ground that the evidence shewed that the other land owned by the plaintiff was not available for the purpose, because such a use of it would have created a nuisance to the plaintiff himself and to his neighbours.

The defendants appeal from this judgment, upon the ground that the true measure of damages is the fair rental value of the land trespassed upon, and also on the ground that the damage from loss of life and condition among the pigs was too remote, and that in any case the amount allowed was excessive.

I agree with the Judge appealed from that the plaintiff did all that he could reasonably be expected to do in the way of attempting to secure other premises. If other suitable premises were in fact available for him for his purpose, I think it was incumbent upon the defendants to shew that these could have been secured without unreasonable expense or trouble. But for myself I am unable to conclude that this settles the matter in the plaintiff's favour. It does not seem to have occurred to any one that there were other ways of minimising the loss. Assuming for the moment that the damages claimed are not too remote, and are the natural consequence of the act of trespass, it appears to me that the perfectly obvious course for the plaintiff to adopt was to reduce the number of his pigs to the number which he had kept the previous year, in the same place, without loss, and without feeling the necessity of extending the boundaries

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of his corral. The plaintiff in his evidence says that he had never kept less than 100 pigs in his corral. It is not very clear whether he meant to say, although he is in fact reported to have said, that he had kept 200 pigs in this same corral the year before. His evidence is as follows:—

"Q. How many did you have in May, 1907, there? A. Sometimes I had 125; I don't know exactly.

"Q. Sometimes you had 200, didn't you? A. Yes.

"Q. Why didn't you say so? A. Like this year, I have 200.

"Q. This year, was May of 1908? A. Yes, I had 200 this year.

"Q. I am asking you for May of 1907? You had that 200 that year too? Why don't you say so? A. Two years ago, I want to tell you that I don't know really how many pigs I had at that time, but I never kept less than 100—125, 150—but I can't tell you how many I had that time.

"Q. You might have had 200? A. No, sir; I never had more than 200, only this year I had 215 or 25, something like that."

And again, he says:—

"Q. How many had you the year before? A. I don't remember exactly how many, but I know I had not so many.

"Q. Well, how many? A. I can't tell you; I never counted them, because, like I told you a few minutes ago, you see when I am selling pigs I used to replace them.

"Q. Did you have 200? A. No, not on that place, no; I only had 100 on that place at the most.

"Q. You swear that? A. Yes, sir.

"Q. That you never had more than 100 pigs in this three-quarters of an acre the year before? A. Yes, the year before, about 100 pigs.

"Q. I want you to swear positively. A. I never counted them. I had interest this way for myself, but I never counted them. I used to feed about 100 or 125 pigs all the time.

"Q. Do you want to swear this, that in the year before you didn't carry more than half the pigs that you did last year? A. Yes, about that, 100; I never keep less than 100 pigs, 125, sometimes 150, and the first year I kept 500.

"Q. Do you know what you said just now, you never kept more than 100 pigs? You never kept less than a hundred? A. Yes.

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"Q. So that was the lowest figure you ever kept there? A. Yes."

And again he says,—

"Q. Well, now, did you have any more than 100 at any time in 1907? A. Well, I guess I had more, yes.

"Q. Did you have 150? A. Well, during the winter, yes, I guess I had pretty near 150.

"Q. That is, during the year 1907? A. Yes."

Now, I gather from this that the plaintiff admitted that he kept as many as 150 pigs in his corral during the season of 1907, without feeling any urgent necessity for extension. It is also fairly clear that there was 30 or 33 feet outside of his corral north of it and between it and the cutting which he might have taken into his corral by extending his fence. He says:—

"Q. You had 30 feet between your piggery and cutting that was high land? A. Yes.

"Q. That you could have used? A. I could have used it, I used it too, but I used to put my tank here, and we need a road to go alongside the pasture, and I used to keep my tank to empty my load, so I wanted a little strip to make a road to go round my pasture."

In view of this evidence, I think it is clear that he could at least have used some portion of the 30 feet (or 33 feet, as he calls it elsewhere), and could, in any case, have kept 150 pigs as safely as he had kept those which he had kept in 1907, as he says, without loss.

The number of pigs he was keeping in 1908 was put by him at between 200 and 225. He nowhere swears positively to more than 215. It is, therefore, clear that we cannot safely assume that his pigs were overcrowded to any greater extent than 65 in number.

The plaintiff swears that he knew he was overcrowded, and that he tried to get other premises, but could not do so. The obvious thing for him to do in order to obviate damage resulting from inability to use his extended quarters was to sell 65 pigs and keep his number down. It will not be suggested that he could not sell them. There is surely a market for pigs at all times, even if they are not fat. If, therefore, he had sold 65 of the most saleable of his pigs, he would have been in just as good a position as he was the year before. It cannot, I think, be contended that he had a right to keep



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his excessive number of pigs there, and see them die and deteriorate before his eyes, and then charge the defendants with the whole loss.

It is somewhat difficult to gather from the evidence what the increase in selling value of 65 of the plaintiff's most saleable pigs between the date of the trespass and the ordinary selling-time, when they would be the most fit for sale, would be; but, making the best that can be made from the evidence, I do not see that the difference could possibly be more than $4 or $5 a piece, on an average, at the very outside. Parker, a witness called by the plaintiff, swore that young pigs when weaned are worth $5 a piece, while when they are grown and fat they bring between $10 and $12 a piece. Grown pigs, of which the plaintiff swears he had, I think, 55, would before fattening be forth more surely than the young weaned ones. They ought to be worth at least $6 a piece. Taking the difference in value, therefore, at $5 a piece, the loss, without any deduction for saving of food and labour, would be only $325. Notwithstanding what the plaintiff said about there being no additional labour involved in attending to 50 more pigs, I think some allowance should be made for labour. He did not, in any case, have to incur the labour and expense of building his extended corral. The food for 65 additional pigs was something which he would have saved by selling them at once. On the whole, I think $250 is the utmost that could safely be allowed. I am confident that, if the plaintiff had adopted the reasonable course of keeping his number of pigs within the number which he had safely kept the year before, without loss, on the same space, by selling 65 of them, when he saw his intended extension of premises to be impossible, he would not have incurred an actual loss of more than $250, that is, a little less than $4 a piece.

Mr. Justice Beck, in restoring the original finding of the Clerk, simply accepted his calculations, and in his first report the Clerk gives no indication of how he arrived at the sum of $640. Indeed, Mr. Justice Scott seems to have understood this to have been the cost of repairing the premises injured, which is clearly, under the authorities, not the true measure of damages, and cannot in any case be applied here. Even if he calculated the loss on the pigs, it is clear that he must have taken into account losses from death which the plaintiff could easily have prevented by

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reducing his number. He must have proceeded upon a wrong principle, and I think we should now end this unfortunate wrangle by dealing with the case as best we can, on the evidence before us, without again sending it back for further evidence and further costs. I think $250 only should, in any case, be allowed on the first item.

With regard to the contention that the rental value of the land should be adopted as the measure of damages, it seems to me that it is utterly impossible and unfair to apply such a rule here. It amounts to saying this, that a person who deprives another of the use of his land is only to pay the injured person what the land could be rented to third parties for. The result of that would be, that, if no tenants could be found at all for the land, if it had no regular rental value because it was of no use to other people, yet, though its use might be exceedingly valuable to the owner, whose remaining land was adjacent to it, and who could, owing to its proximity to his own, have made a profitable use of it in connection with his other land, and who in fact was prevented from making such use by reason of the trespass, nevertheless the owner is to get no damage at all. It is, in my opinion, useless to attempt to apply a general rule which has been applied in cases where the facts do not correspond. I have found no case of pure trespass to land where the rule of mere rental value was applied in such circumstances as exist here. I cannot see how it can be open to a trespasser to say to the owner, "Oh, I had no idea that you intended to use your land in that way." A trespasser must be held to know that the owner of land will try to use it in any reasonable and usual way which would be profitable to him.

In Halsbury's Laws of England, vol. 10, p. 317, it is said: "The rule with regard to special circumstances is somewhat different in cases of tort from that in cases of contract. In cases of tort which are not founded upon contract the defendant's knowledge must be estimated at the time of the wrongful act. And the inquiry is, not only whether he knew of any special circumstances attaching at the time, but also whether he had reasonable means of knowing them, and whether the damage which ensued was such as he could fairly be expected to anticipate as likely to result from his act."

Again, at pp. 340 and 341 of the same volume, the two following passages occur: "Where by the trespass of the

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defendant the plaintiff has been wholly deprived of his land he is to be compensated according to his interest, and if he is a freeholder entitled to possession, the damages will be the total selling value of the land." "Where the trespass consists of a wrongful and unauthorised use of the plaintiff's land, the measure of damages is not the depreciation in the value of the plaintiff's land or the amount required to repair the injury which has been suffered, but such reasonable payment in the nature of rent as would have been required for a license to make use of the plaintiff's land during the period whilst it was so used."

The authorities quoted for the last proposition are, as will appear on examination, carelessly cited; but the result I deduce from them and other cases is this, that, in the absence of special damage, where a plaintiff is deprived of his land entirely, the trespasser must pay merely its value, or, where he is deprived of its use for a term, the value of that term, just as if a lease or license had been given. The same rule, indeed, applies to land as to chattels. If the plaintiff's chattels are taken away, the trespasser must pay their value in the ordinary case. But special damages may be pleaded and proven.

For example, in Bodlye v. Reynolds (1846), 8 Q. B. 779, although the tools converted were worth only £10, the plaintiff was given damages for loss of their use as well, and got a judgment for £20. The Court there said: "Where special damage is laid and proved, there can be no reason for measuring the damages by the value of the chattel converted."

In France v. Gaudet, L. R. 6 Q. B. at p. 205, there is the following reference to Bodley v. Reynolds: "We think that (in that case) there must have been evidence of knowledge on the part of the defendant that in the nature of things inconvenience beyond the loss of the tools" (i.e., I take the Court to mean the value of the tools) "must have been occasioned to the plaintiff."

Now, it seems to me that these cases dealing with chattels furnish a solution of the problem as to rental value of land being the true measure of damage in case of trespass. The rule is, as stated in the extracts from Halsbury, that, where the whole land is taken, its value is the measure of damage just as in the case of total conversion of chattels. Where, however, there has been only a wrongful user for a period, the value of the estate taken, i.e., a lease for a term of the trespass, is the ordinary measure of damage.

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But this is aside from any question of special damage. In none of the cases upon which the rule of rental value is based, does there appear to have been any question of special damage raised. The plaintiff was simply deprived of his property, viz., a short term in the land. The question was, what was the value of the term, i.e., the rental value; just as in the case of deprivation of chattels the ordinary question is, what was their value? But it appears clear that in the case of land, as well as in the case of chattels, special damage arising from deprivation of use for special purposes may be pleaded and proven. There may be damages given not merely for the value of the goods converted, of the term in the land forcibly taken, but also "for the detaining," if the plaintiff has suffered any special damage by reason thereof.

The statement of claim is not before us, but the appellants are seeking to modify the judgment. They were chiefly responsible for the contents of the appeal-book. The inquiry before the Clerk proceeded upon the basis of special damages having been claimed; and I do not think it would be open to the appellants now to say that special damage was not alleged in the pleadings.

The view I take seems to have been followed by Meagher, J., in the appeal in Loy v. Town of Dartmouth, 30 N. S. R. at p. 213.

There are also some notes of American cases in 13 Cyc. 152, 155. A Texas appeal case says: "While the measure of damages for placing cars in front of plaintiff's premises is in general the depreciation in value of the use of the property during the time the cars are there, special damages may also be recovered where they are warranted by the facts and are pleaded with particularity and certainty." And a Pennsylvania case says: "The true rule of damages in such a case is to estimate the injury sustained from the diversion of the water in the use of the land for the purposes to which it was devoted or for which it would have been used but for the refusal of the defendant upon notice to discontinue the diversion. As a means of computation a reduction of rental value from this cause may be shewn."

The only question, therefore, is the question of notice or knowledge, as referred to in the first quotation I have made from Halsbury and in France v. Gaudet.

Now in none of the cases which are given as authority for the rule just above quoted from Halsbury was there a

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trespass to land. In general the rule has been deduced in cases of accident from negligence and the like or from breach of some statutory duty. In the case of trespass to both chattels and land, it seems to me the rule that the damage must be such as the defendant could fairly be expected to anticipate as likely to result from his act, may well be applicable; but, in my opinion, a trespasser can always be fairly expected to anticipate that the owner will be intending to use his property—whether chattels or land—in any reasonable and usual way. Possibly, anticipation of some very peculiar and unusual use intended to be made of the property could not be fairly expected of him, but it seems to me that extension of a pig corral, already on part of an owner's property, to wider boundaries, so as to give greater accommodation, is not such a peculiar or unusual use as to relieve a trespasser from the duty of anticipating the possibility of it.

The evidence points strongly to the conclusion, and the Clerk, I think, must have so found, that the plaintiff was overcrowded, and that he intended to relieve this by an extension of his corral. I think we must take it to be the fact that he was prevented from an actually intended and natural and probable use of his property by the defendants' trespass; and that, assuming him to have done what I think he should have done, viz., sell 65 of his pigs, he was prevented from carrying this additional number and so from realising a profit thereby. It is, of course, purely a case of loss of profits. The plaintiff had his pigs there. He had all arrangements made for keeping them, except the extension of his corral. The simple question is this: If he had sold 65 pigs for what they would bring, could he have sued for damages for loss of profit of these, saying that he was deprived of a place to keep them properly so as to fatten and sell them at a better time? The rule as to recovery of profits as damages is stated to be, "that they can be recovered only when they are made reasonably certain by the proof of actual facts with present data for a rational estimate of their amount." See 13 Cyc. 49. In the present case, I think, the fact of loss of profit is sufficiently certain, although the exact amount may be difficult to ascertain from the evidence as it stands. Loss of profits arising from the prevention of a clearly intended and obviously reasonable and natural use of land as a place of business, or as a means of extending a business already

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existing, seems to me to be a natural and proximate result of such prevention.

I think, therefore, though with some hesitation, that there should be damages in this respect, but I am satisfied that they should be reduced to $250.

The defendants also appeal from the finding of Mr. Justice Beck whereby he allowed the sum of $250 as damages resulting from the service of an abandoned notice to expropriate lot 32. The Clerk, in his second report, acting upon the opinion expressed by Mr. Justice Scott, allowed only $50 as being a fair rental value. The plaintiff asserted that he had intended to use this land as a garden, and that he had prepared most of the land for this purpose, the year before, by breaking and clearing it. He had not cropped it at all before, himself, but his brother had cropped about half an acre of it, and had raised some vegetables, cabbages, carrots, beets, onions, and lettuce. There is no definite evidence to shew how much the plaintiff could make out of a garden such as this, no evidence of what he or his brother ever made out of a garden. The whole question simply is reduced to this: Can the plaintiff recover as special damage the anticipated profit on a crop of vegetables which he was prevented from sowing or planting? In my opinion, there is much more uncertainty here than in the case of the pigs. Weather conditions and conditions of soil do not affect them. Crops are notoriously dependent upon the uncertainties of weather. I am satisfied that we have here too much uncertainty to justify a Court in awarding damages for loss of anticipated profits. My brother Beck suggested that in any case twenty per cent. of the value would be a fair rental value for such a piece of ground; but, with great respect, I cannot see that we are justified in fixing that as the rental value arbitrarily, when there is no evidence at all to suggest it. The Clerk himself went far enough in that direction, when he disregarded the only evidence adduced, which was to the effect that $10 an acre would be a fair rental, and allowed five per cent. of the value, viz., $50. I think that allowance should, in any case, not be increased, and that the Clerk's decision should on this point be left undisturbed.

The nominal allowance of $5 for loss of business should, I think, in view of what I have said, be also disallowed.

The result is, that judgment should be directed to be entered for the plaintiff for $300 as damages for the tres-

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pass complained of, with interest at six per cent. from July, 1908, or $345 in all.

With regard to costs, the defendants should get the costs of the first motion for judgment before Mr. Justice Scott, because that motion was refused and properly so. The plaintiff should get the costs of the motion to vary before Mr. Justice Beck, because he was right in being dissatisfied with the Clerk's second decision. The defendants should get the costs of this appeal, because they have been substantially successful. The costs of the second reference should be treated as part of the costs of the first, which are disposed of in the original judgment at the trial. These various costs of the actions should be taxed and a balance struck, including the amount for which judgment is now directed to be entered, and a final judgment entered in favour of the party to whom the excess is due, for the amount of such excess.

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## ALBERTA.

BECK, J. FEBRUARY 6TH, 1912.

TRIAL.

### LEGEAS v. TRUSTS AND GUARANTEE CO.

*Contract—Remuneration for Services—Agreement to Make Will in Favour of Servant—Breach—Revocation of Will Made—Right to Recover against Estate of Deceased—Costs—Indemnity—Appeal.*

Upon the evidence, it was *held*, that the plaintiff had established a contract made between herself and one F., deceased, whereby he agreed to leave her by will the whole of his property, in consideration of services to be rendered by her, which had been rendered; that he had made a will in her favour, but had revoked it, and died intestate; and that the plaintiff was entitled, against the defendants, the administrators of F.'s estate, to the whole of his estate, after payment of debts, funeral expenses, and the defendants' costs of the action to establish the contract.

*Semble*, that, in the event of an appeal, the defendants would not be protected as to their costs, and should obtain indemnity from the next of kin of F., if the latter desired an appeal to be taken.

The plaintiff alleged that, in the year 1904, one Ezra Ferguson had agreed with her that, if she would keep house for him on his farm near Leduc, in the province of Alberta,

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he would make a will leaving her all his property at the time of his death; and, in pursuance of this agreement, she had gone and lived with him for some years until his death. Ferguson died in the fall of 1910; and, upon his shack being visited by two men, Mundy and Eccker, the latter a son-in-law of Ferguson, a will was found in his trunk bequeathing all his property to Mary Legeas, the plaintiff. The will was witnessed by two former neighbours, one of whom had since died. At the time the will was found it appeared to be unsigned by Ferguson, but its appearance indicated that a name had at one time been there, and had subsequently been scratched out.

The defendants were appointed administrators of Ferguson's estate, and the action was brought against them in that capacity to enforce the alleged agreement or for remuneration for the plaintiff's services.

The evidence at the trial went to shew that Ferguson had, in June prior to his death, erased his signature owing to a quarrel with the plaintiff.

The action was tried before BECK, J., without a jury.

Pratt, for the plaintiff.

Knox, for the defendants.

BECK, J.:—I am satisfied, upon the evidence, that there was an agreement to the effect set up by the plaintiff, that, if she should go and live with Ferguson, take her family there, and if, after a month or two, they were each satisfied with the other, then, if she would do all that class of work that a woman in her condition of life, living on such a farm as they were living upon, usually does, and would continue to do so, he would, when he died, leave her the whole of his property. I have not the faintest doubt about the truth of the evidence on that point—that there was such an agreement. I think it is hardly arguable that the old man did not actually make such a will; and the conclusion I have come to is, that he revoked that will in June, 1910, as shewn by the evidence of Durstling, immediately after the quarrel that arose after Durstling and Ferguson were at the plaintiff's house, and that up to that time he had the intention of carrying out his agreement; that he had carried it out up to that time; and that, owing to that quarrel, he revoked his will and thereby broke his contract.

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Now, there was some contradiction or what appeared to be a contradiction of the evidence of the plaintiff by Mundy and Eccker. Now, I believe the plaintiff's account of what took place on that occasion, and I do not believe the account given by Mundy and Eccker, where it contradicts hers. I am not going to the extent of saying that I believe that they wilfully misrepresented things; but my explanation of it is, and I have little doubt but that it is the correct explanation, that they misunderstood her; at all events, I believe her account of it. She speaks, as everybody who has been listening to her must know, most indifferent English, and they might very easily have misunderstood the statement they say she made, that she knew the will was not signed. I am quite satisfied that she never made any such statement, and I am satisfied that up to that time she supposed that the will was good, had no knowledge that he had revoked it, as I am satisfied he did, as I have already said, in June of the previous year.

Now, that being my finding on the facts, I think, as a matter of law, it is a binding contract, and that this Court has power and ought to give effect to it. I see by the papers put in in connection with the issuing of the letters probate that the estate is sworn at $3,223.21. It is said that there are some debts. I think that might be presumed. Certainly there are the funeral expenses, there are the costs of the administration proceedings, the compensation of the administrator. There will be, no doubt, several hundred dollars by way of the ordinary deductions for payment of funeral expenses, for the few debts which we may suppose are in existence, without any evidence of there being any in fact, and the costs of the administration. This amount will have to be deducted from the sworn value of the estate.

Now, with regard to this action, I think, the administrators were quite justified in contesting the matter. This agreement was a thing which had to be established in just such a way as it has been proved, by proving it in an action, and the administrators could not safely recognise it unless there was a decision of the Court in favour of the plaintiff. For that reason, while I find in favour of the plaintiff, that her claim is established, and while I must give judgment for her, with the costs of the action, I think that not only her costs of this action but the costs of the defendants in the action ought to be paid out of the estate. As I say, the administra-

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tors could know, with such certainty as would make them safe in acting, whether the plaintiff's claim was a valid or invalid one, only by just such a trial as has taken place. Now, when the costs on both sides of the action are taken out of the estate, I think the whole residue of the estate will be little enough for the plaintiff to receive in compensation for her services or as a compensation for the breach by Ferguson of the contract which I have held has been established.

Now, I think I should add this. If there is any idea of appealing from my decision, I think that the administrators would not be justified in doing that upon their own responsibility. They are protected by the decision which I now give. If there is to be any appeal, I do not think they would be protected, if they failed in the appeal, by having the costs of the appeal ordered to be paid out of the estate. If the beneficiaries, or rather those persons who would be beneficiaries but for this judgment, wish to appeal, I think the defendants have a right to insist upon their being indemnified for the costs of the appeal.

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## ALBERTA.

SCOTT, J. FEBRUARY 7TH, 1912.

TRIAL.

## NEROS v. SWANSON.

*Contract—Work and Labour—Ouster of Contractors—Non-completion of Work—Quantum Meruit — Damages for not being Permitted to Complete—Conversion of Tools—Demand—User.*

The plaintiffs on the 28th May, 1911, entered into a contract in writing with the defendants to do grading for railway construction, for which the plaintiffs were to be paid at certain specified rates for the quantity of material excavated. The work was to be completed by the 1st November, 1911, but no provision was made for a penalty for non-performance within that time. The agreement provided that, if at any time, in the opinion of the engineer, there was not sufficient force engaged on the work to complete it in the time specified, the defendants should have the right to put on additional force, to be charged to the plaintiffs, or to take over the work

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from them by giving three days' notice in writing. On the 10th November, 1911, the work not having been completed, the defendants gave the plaintiffs notice in writing to put on a larger force, and that, if this was not done within four days, the defendants would have to complete the work and charge the expense to the plaintiffs. On the 27th November, 1911, one of the defendants appeared at the work with his foreman and put the latter in charge of it:—

*Held*, that what occurred at that time was in effect an ouster of the plaintiffs from the work, irrespective of what the defendants intended by their action. The defendants had not the right to put on additional force and also to take charge of and oversee the work of the plaintiffs' workmen and to maintain that the work was still being carried on as the plaintiffs' work. The defendants gave no notice of their intention to take over the work. The plaintiffs were, therefore, entitled to recover on a *quantum meruit* for the work performed by them, and also to damages, if any, sustained by reason of their not having been permitted to complete the work; but no damages were proved.

*Held*, also, that, as the plaintiffs had been ousted from the work before completion, a provision in the agreement that no final payment would be made on account of the work until completion and acceptance by the railway company's engineer, etc., was inoperative.

*Held*, also, that the defendants were liable for the value of certain tools of the plaintiffs which they took possession of when they ousted the plaintiffs; although there was no evidence of a demand for the return of the tools, their use by the defendants shewed a conversion.

And *held*, upon the evidence, that, upon a proper estimate of the work done and the value of the tools, with proper deductions for goods supplied, moneys paid, etc., the plaintiffs were entitled to recover $423.58, with costs.

Action for the price of work done by the plaintiffs for the defendants under a contract and for damages for breach of the contract.

H. H. Robertson, for the plaintiffs.

O. M. Biggar, for the defendants.

SCOTT J.:—The plaintiffs on the 28th May, 1911, entered into a contract in writing with the defendants to do all the grading on the line of the Canadian Northern Railway, between stations 186 and 205.50, for which they were to be paid at certain specified rates for the quantity of material excavated by them for the purpose.

By the terms of the agreement, the work was to be completed by the 1st November, 1911, but no provision was made for a penalty for non-performance within the time limited. It was also a term of the agreement that, if at any time, in the opinion of the engineer, there was not sufficient force engaged on the work to complete it in the time specified, the defendants should have the right to put on additional force, to be charged to the plaintiffs, or to take over the work from them by giving three days' notice in writing.

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On the 10th November, 1911, the work not having been then completed, the defendants gave the plaintiffs notice in writing that they had been informed by the railway company's engineer that all the force that could be worked had to be put on immediately, and that, if this was not done in four days, they would have to put on a big enough force to complete the contract as quickly as possible, and that all expenses connected therewith would be charged to the plaintiffs' account.

On the 27th November following, one of the defendants appeared at the work with his foreman and put the latter in charge of it. I hold that what occurred at that time was in effect an ouster of the plaintiffs from the work, irrespective of what the defendants intended by their action. By the terms of the contract, they had the right, upon notice, either to put on an additional force or to take over the work. They had not the right which they assumed, viz., to put on additional force and also to take charge of and oversee the work of the plaintiffs' workmen and to claim that the work was still being carried on as the plaintiffs' work. They did not give any notice of their intention to take over the work.

The plaintiffs are, therefore, entitled to recover on a quantum meruit for the work performed by them, and also to damages, if any, that they may have sustained by reason of their not having been permitted to complete the work. I hold, however, that they have failed to shew that they sustained any such damages. Some evidence is given on the question of such damages, but it was not sufficient to enable me to determine whether any was sustained.

The agreement provides that no final payment will be made on account of the work until completion and acceptance by the railway company's engineer, when final estimate should be given, and that ten per cent. should be held back on all progress estimates until the final estimate. It is contended by the defendants that the plaintiffs, having abandoned the work, are not entitled to any payment for the work done by them. I have already held that the defendants ousted them from the work before its completion, and the provision referred to is, therefore, inoperative.

Mr. Chappell, the railway company's engineer, on the 2nd December, measured the work. He had seen the work between that date and the 27th November. His estimate of the plaintiffs' work is as follows:—

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| | |
|---|---|
| Solid rock, 51 yards @ $1 ..... | $ 51 00 |
| Loose rock, 75 yards @ 35c. ..... | 36 25 |
| Hardpan, 3,667 yards @ 32c. ..... | 1,173 44 |
| Common earth, 2,152 yards @ 21c. .. | 451 92 |
| Sandstone, 1,229 yards @ 80c. ..... | 983 20 |
| Overhaul ..... | 65 00 |
| | $2,760 81 |

He did not, however, measure or estimate a small excavation—about 100 yards—shewn to have been made by the plaintiffs. From his knowledge of its position he classified the material as follows:—

| | |
|---|---|
| 20 yards loose rock @ 35c. ..... | $ 7 00 |
| 30 yards hardpan @ 32c. ..... | 9 60 |
| 50 yards common earth @ 21c. ..... | 10 50 |
| | $27 10 |

which brings his total estimate up to $2,787.91.

Lynns, an engineer employed by the plaintiffs, measured the work done by them on the 13th January, after the whole work was completed. His measurement and estimate is based upon information furnished by Neros, one of the plaintiffs, who testifies that the information so furnished was correct. His estimate is as follows:—

| | |
|---|---|
| Solid rock, 55 yards @ $1.00 ..... | $ 55 00 |
| Loose rock, 200 yards @ 35c. ..... | 70 00 |
| Hardpan, 3,700 yards @ 32c. ..... | 1,184 00 |
| Sandstone, 1,107 yards @ 80c. ..... | 885 60 |
| Common earth, 4,148 yards @ 21c. .... | 871 00 |
| Overhaul ..... | 65 00 |
| | $3,130 60 |

Neros states that it was understood that the plaintiffs were to be paid on the estimate of the railway company's engineer, both as to quantities and specification, and that that is the usual contract. Had Mr. Chappell's estimate been based upon measurements made by him at the time the defendants took over the work, I should be bound to accept it as conclusive; but, as the measurements were taken some days after that, and after the defendants had done work thereon in the meantime, his knowledge, if any, of the proportion of the whole done by the plaintiffs must have been based upon information obtained from the defendants. It

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does not appear that any such information was given, or, if given, that it was correct. If any was given, it must have been incorrect, as he omitted to estimate upon some of the work which is shewn to have been done by the plaintiffs. As Mr. Lynn's measurements were based upon information shewn to have been correct, I accept his estimate and hold that the plaintiffs are entitled to $3,130.60 for the work done by them.

The plaintiffs also allege that the defendants wrongfully converted to their own use certain tools to the value of $28.50 and wrongfully detained the same, that the plaintiffs demanded payment therefor, but the defendants refused to account for or return the same. The defendants deny that any such demand was made.

The evidence shews that, when the defendants ousted the plaintiffs from the work, they took possession not only of the tools referred to, but also of a number of others and continued to use them on the work. There is no evidence of any demand having been made for their return, but their use by the defendants constitutes sufficient evidence of the conversion; and I, therefore, hold that the defendants are entitled to recover their value, which I fix at $28.50.

The defendants claim to have furnished goods, money, and supplies to the plaintiffs, and to have paid wages for them, to the amount in all of $2,839.92, from which they admit there should be a deduction of $16 for goods returned.

In the defendants' statement of account is included a charge of $30 for damages to one of their cars and a charge of $10 for damages to the box of another car. These charges are, in my opinion, excessive, and I reduce them to $15 and $5 respectively, making together a reduction of $20 from the amount claimed by them.

On the 24th November, the defendants supplied the plaintiffs with 25 kegs of powder, of which only about 5½ kegs were used by the plaintiffs when the defendants took possession of the work and used the remainder of the powder. I think it only reasonable that the plaintiffs should be called upon to pay only for the portion they themselves used. I, therefore, deduct, from the amount claimed by them, $68.40, being the value of 19 kegs at $3.60. It also appears that the defendants used some of the dynamite supplied by them to the plaintiffs, but I have no means of ascertaining with any certainty the quantity so used or its value.

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I find that there is due to the plaintiffs $423.59 made up as follows:—

| | | | |
|---|---|---|---|
| Amount allowed plaintiffs for work ..... | | | $3,130 60 |
| Value of tools converted by defendants ..... | | | 28 50 |
| | | | $3,159 10 |
| Defendants claim for goods, etc. ..... | | $2,839 92 | |
| Less goods returned ..... | $16 00 | | |
| Less overcharge on cars .... | 20 00 | | |
| Less powder used by defts. .. | 68 40 | 104 40 | 2,735 52 |
| | | | $ 423 58 |

I give judgment for the plaintiffs for $423.58, with costs

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## ALBERTA.

SCOTT, J. FEBRUARY 8TH, 1912.

CHAMBERS.

### LAVALLEE v. CANADIAN NORTHERN R. W. CO.
### RIOPEL v. CANADIAN NORTHERN R. W. CO.
### MEUNIER v. CANADIAN NORTHERN R. W. CO.

*Practice—Chambers Summons — Enlargement—Abandonment.*

**Summonses to vary a report and for other relief, made returnable in Chambers and enlarged at different times, were *held*, not to have been abandoned, considering that there was a dispute as to the period of one of the enlargements, and that a Judge did not sit regularly in Chambers.**

Application by the plaintiffs to vary the Clerk's report and for other relief.

E. B. Edwards, K.C., for the plaintiffs.

S. B. Woods, K.C., for the defendants.

SCOTT, J.:—The summonses on the applications were returnable in Chambers on the 27th June. They were then enlarged until the 30th June, when they were again enlarged until after vacation. There is no record of the terms

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of the enlargement, or as to whether a certain date after vacation was agreed upon or fixed.

On the 13th October last, the plaintiffs' solicitor served the defendants' solicitor with notice that the applications would be renewed on the 17th October. They were renewed before me on the latter date, when counsel for the defendants contended that they were adjourned until the first Chambers day after vacation, and that, as they had not then been spoken to, they must be treated as having been abandoned. Counsel for the plaintiffs contended that the adjournment was until after vacation without a day having been named. Affidavits as to the terms of the adjournment were afterwards filed by both counsel. Their statements differ as to the terms of the adjournment, and they raise a question of veracity which I should not be called upon to decide.

The matter is at most a question merely of the costs of the applications, as, even if I held that the applications had been abandoned and that the time had expired for making a fresh application, I would have no hesitation, under the circumstances, in extending the time for making one. If the contention of the defendants' counsel were upheld, I doubt whether he would be entitled to claim the costs of the motion, as they were not applied for on the first Chambers day after the return day. See Woodcock v. Oxford, etc., R. W. Co., 17 Jur. 33.

Even if the adjournment had been for the first Chambers day after vacation, I think that, in view of the conditions prevailing in the Court here at the present time, the strict practice which may be enforced in England in like cases should not be insisted upon here. There Chambers are held at regular times. Here the same regularity cannot be maintained. I doubt whether in this Court there was any fixed day for Chambers for many weeks after vacation; and, in my view, it would be unreasonable to hold that the plaintiffs' solicitor should, in order to keep his applications alive, be forced to attend day after day during those weeks in order to ascertain whether Chambers would be held on the usual days.

In view of what I have stated, I hold that the summonses referred to have not been shewn to have been abandoned.

I direct that the applications may be brought on for hearing by either party, upon giving two clear days' notice to the other party.



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## ALBERTA.

BECK, J. FEBRUARY, 9TH, 1912.

TRIAL.

## TOFFEY v. SUTHERLAND.

*Fraud and Misrepresentation — Exchange of Properties — Untrue Representations — Location and Value — Rescission.*

**An exchange of the plaintiff's farm for city lots in which the defendants were dealing, effected by regular transfers of both properties, was rescinded, upon the ground of untrue statements made by the defendants as to the location, position, and value of the city lots, which the plaintiff had not seen.**

Action to set aside a transfer of the plaintiff's farm to the defendants in exchange for a transfer to the plaintiff of nine lots in the city of Edmonton.

The plaintiff's account of the transaction was, that he went into the office of a real estate agent named Magee, who was selling agent for the defendants in respect of a subdivision of the city of Edmonton, with the intention of investigating a proposition to exchange his quarter section of land situated at Clyde, Alberta, for property in Edmonton, and, while there, was shewn a plan of this subdivision of the city of Edmonton, and finally signed what he supposed was an agreement to look over the property the next morning, and, if satisfied with it, to make the exchange. Upon his arrival at his home, upon looking at the copy of the document which was given to him, he found that he had a transfer of nine lots in the subdivision; and the next morning, upon inquiring, found that he had signed a transfer of his farm. The defendants took the position that the plaintiff thoroughly understood that he was signing a transfer, and that the exchange was made and closed in the office of Magee. The plaintiff repudiated the exchange on the morning following the signing of the documents, and brought this action, alleging fraud and misrepresentation.

The action was tried before BECK, J., without a jury.

Byers, for the plaintiff.

Brown, for the defendants.

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BECK, J.:—My judgment is in favour of the plaintiff. I am going to declare that the transaction shall be set aside. I do it on this ground. I am satisfied that the plaintiff bought this land relying upon representations of its value and a further representation, which affected him to some extent, that it was on Jasper avenue, and that he was deceived to some extent by that name and by the appearance of the property upon the maps and plans which were shewn to him. He never saw the property, and he depended upon what was made to appear at the meeting at which the transaction was, as the defendants say, closed.

Now, the maps and the plans are all deceptive. They are deceptive in more ways than one. There are marks on this plan of the city—this plan of the city shews, in more prominent lines, the proposed extension of the boundaries of the city than the actual boundaries of it; it shews a straight line as Jasper avenue right out to this property. As a matter of fact, there is no straight line as a continuation of Jasper avenue to that property; there is a considerable detour; and I have got to say here that I think it is a thing which is misrepresented, probably by many people, without thinking it would have the effect of a misrepresentation; but it, to my mind, is a gross misrepresentation to file a plan shewing a property eight miles from the centre of the city and five or six miles from the boundary, as on Jasper avenue. It is not on Jasper avenue.

These plans, I am inclined to think, have to get the approval of the Minister or Deputy Minister of Public Works, I am not sure about that, but, if he gives approval to plans with these names on them, I think it is time to stop. Not only that, but I think the legislature, in connection with the bill before it now, in dealing with these subdivisions, might very well put in a provision to prevent the naming of a road away out in the country like this by the name of a street in town.

Now, I am satisfied that at that conversation, besides this misleading of the plaintiff by the appearance of these plans as to the distance and the continuation of Jasper avenue, he was misled also as to the value. I believe him when he states that, before the transaction was closed in the manner in which they say it was closed, Sutherland spoke of the value, and that the plaintiff depended upon Sutherland's statement, and I am satisfied that there is not the value to-

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day in these lots that is placed upon them by the prices which these men are trying to get for them. The best price that anybody has spoken of for lots there is that spoken of by Mr. Mills, and he would be willing to sell lots that he got there at $200 a lot, and his lots are some considerable distance nearer to Edmonton, and they are on what is called Jasper avenue. Of these lots which are in question here, four are on Jasper avenue, so-called, and the rest on a side street, which is called 7th street. Now, when Mr. Mills got these lots, he didn't pay cash for them; he got them in an exchange for property which he had great difficulty in getting a sale for down in Millet. I have not a great deal of confidence in his appreciation of the value of them; he is not a real estate man; I am not sure that I would have much more confidence in the opinion of a good many of the real estate men, than I would in his, but he is the man who gives the highest price which has been given for these lots, of those who have spoken about them outside of the parties interested. Mr. Hart comes next, and his value would be, as I estimated from his figures, for such lots as these, about $150; so that I find as a fact that these lots, at the time this conversation took place, were not worth the price which was placed upon them. I don't think they were worth more than $150 a piece. I would not give that for them myself. I find as a fact that Sutherland, in the presence of his co-defendant, so acted and so spoke as to lead the plaintiff to believe that the lots were worth approximately the prices the plaintiff was asked to pay for them.

Now, I am not quite satisfied that I have got the full truth or the exact truth of either side of the case. I have some little doubt about the plaintiff's evidence as to whether he intended to conclude the transaction that evening, but I do believe his evidence in the other respect, that he depended entirely for his information as to the value of the lots and the location and so on upon the defendants and their agent, Magee; and, as he relied upon their information—and I hold he so relied—it is not necessary for me to find anything more—it is not necessary for me to find that there was fraud on the part of the defendants, and I do not find it. It is sufficient for the purposes of my decision that I find that there was, in fact, a misrepresentation, and I do find that. A good deal of conversation took place there; and, as I say, I believe the plaintiff's account of it. I can quite well under-

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stand that a good deal may have been said which was of interest to him which the other people thought of no particular interest—of no particular importance to them—and, consequently, they do not remember it now. They made, as I find, by reason of the conversation that went on in their presence—conversation in which they took part—such statements as amount to direct statements of the location, position, and value of this property, which were not true.

On that ground, I direct judgment to be entered rescinding the transaction, and I think I should make it with costs.

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## ALBERTA.

SIMMONS, J. FEBRUARY 14TH, 1912.

TRIAL.

## AURIOL v. ALBERTA LAND AND INVESTMENT CO.

*Vendor and Purchaser—Contract for Sale of Land—Payment of Purchase-money by Instalments — Demand by Vendor of Last Instalment and Tender of Transfer—Right of Purchaser to Refuse to Pay until Title Shewn—Production of Certificate of Title—Executions—Arrears of Taxes—Real Property Act, sec. 43—Specific Performance—Terms—Costs.*

An agreement for the sale of land by the plaintiff to the defendants provided for payment of the purchase-money in instalments, and that on payment of the instalments with interest "the vendor will immediately thereupon transfer to the purchasers in fee simple the said tract of land. . . . Time is to be considered the essence of the agreement." On or about the day when the last instalment was due, the plaintiff demanded from the defendants payment of the amount and tendered a transfer of the land, properly executed by the plaintiff. The defendants refused to pay and accept the transfer until absolutely assured that the property was not incumbered:—

*Held*, in an action for the balance of the purchase-money, that, as to the production of the plaintiff's certificate of title, which covered other lots, he had done all that could be required of him when he deposited it with the Registrar for the purpose of registration of the transfer to the defendants.

*Held*, also, that the defendants were within their rights in demanding an abstract of title and a certificate from the Registrar that there were no executions registered against the plaintiff; the vendor is bound to shew and make good title in accordance with the contract.

*Mayberry* v. *Williams*, 15 W. L. R. 553, explained and followed.

*Held*, also, that the effect of sec. 43 of the Real Property Act is to make unpaid taxes a charge upon the land mentioned in any

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**certificate of title; and a purchaser is entitled to an assurance from his vendor that there is no charge upon the land sold for arrears of taxes.**

***Held*, therefore, that the plaintiff was entitled to payment of the purchase-money, but only upon proof of title and that there were no arrears of taxes; and that the plaintiff should pay the defendants' costs of the action.**

Action by vendor for specific performance of a contract for the sale and purchase of land, by payment of the balance of the purchase-price.

E. H. Nichols, for the plaintiff.

G. H. Ross, for the defendants.

SIMMONS, J.:—The defendants bought from the plaintiff four lots in the town of Camrose for $1,661, paying cash $553, and the balance payable in two equal instalments, of $553.70 each, in three and six months respectively, with interest at 6 per cent. per annum. An agreement for sale was executed by the parties, setting out these terms of payment. The agreement contained the following clauses: "In consideration whereof and on payment of the said sums of money with interest thereon as aforesaid the vendor will immediately thereupon transfer to the purchasers in fee simple the said tract of land with the appurtenances, but subject to the conditions and reservations expressed in the original grant thereof from the Crown: and such transfer shall be prepared by the vendor at the expense of the purchasers." "Time is to be considered the essence of the agreement." On the 2nd or 3rd October, 1911, a clerk in the office of the plaintiff's solicitors attended on Mr. Bryan, manager of the defendant company, and tendered a transfer, properly executed, to Mr. Bryan, coupled with a demand for the final instalment of principal and interest and $3 for drawing the transfer. Mr. Bryan says that the letter (exhibit 5) was handed to him with the transfer, and the letter is as follows:—

"Calgary, Oct. 9th, 1911.

"The Alberta Land & Investment Co., Calgary.

"Dear Sirs:—

"Re Auriol. We beg to tender you herewith transfer of lots 5 and 6 in block "E.," 1 and 2 in block "D.," and 5 and 6 in block "D.," according to a plan of subdivision of block 7, known as Fairview Addition, registered as plan 1,700-U., which plan of subdivision is registered as 5,262-A.B., and to

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inform you that the balance due under this contract is $571. We are sending duplicate certificate of title to the Registrar, and the lands are registered in the name of André Auriol, grantor of the within transfer. In other respects the title is clear. You may receive this transfer on payment of $571.

"Yours truly,

"Nichols & Savary."

Mr. Bryan says he was unwilling to part with his money till he was absolutely assured that the property was not incumbered; that the vendor did not give an assurance satisfactory to him. Mr. Bryan says he did not know that there were no arrears of taxes or no execution against the vendor, and did not know who was the registered owner of the land when the transfer was tendered to him. The defendants had, prior to this, received from the plaintiff's solicitors the following letter:—

"Calgary, Oct. 4, 1911.

"The Alberta Land & Investment Co. Ltd., Calgary.

"Dear Sirs:—

"Re Auriol. Under agreement dated 8th March last you purchased lots 5 and 6, block "E.," 1 and 2 in block "B.," and 5 and 6 in block "B.," subdivision of Fairview Addition, Camrose, registered as plan 5,262-A.B. Final payment of $553.70 is in arrear under the terms of the contract. You were tendered transfer and neglected to pay the amount, which as of to-morrow is $571 as follows:—

| | |
|---|---|
| Final instalment ..... | $553 70 |
| Interest to October 5th ..... | 14 30 |
| Fee drawing transfer ..... | 3 00 |
| | $571 00 |

"The charge for the transfer is provided for in the agreement. Of course the principal sum will carry interest until payment. We take this opportunity of notifying you that the taxes are paid on this property, and the title is in the name of André Auriol, transfer from whom was tendered you to-day. Let us have cheque for this sum of $571, and receive the transfer. Your attention will oblige,

"Yours truly,

"Nichols & Savary."

And in reply to the defendants' letter of the 5th October, which was not produced at the trial, the plaintiff's solicitors wrote to the defendant as follows:—

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"Calgary, Oct. 6th, 1911.

"Alberta Loan & Investment Co., Calgary, Alta.

"Dear Sirs:—

"Re Auriol. Replying to yours of the 5th inst., we beg to say that, unless the money was formally tendered, we shall have to insist on the interest being paid. As for the title, we are glad to inform you that it is clear of incumbrance and taxes paid. We shall expect to receive your cheque to-morrow for the amount stated in our previous letter and will deliver you transfer and deposit title in the land titles office.

"Yours truly,
"Nichols & Savary."

The defendants refused to pay the balance until the plaintiff gave them assurances satisfactory to them as to title and as to arrears of taxes. The plaintiff produced at the trial an abstract from the land titles office at Edmonton, shewing the plaintiff to be the registered owner, free from incumbrances, of the lots in question, and also that the certificate of title covering these lots included other lots in the same subdivision.

"North Alberta Land Registration District,
"Edmonton, Alta.

"Messrs. Nichols & Savary, Barristers, etc., Calgary, Alta.

"Sir: Replying to your favour of the 10th instant, asking for information in regard to duplicate certificate of title No. 234-F. 16, in the name of André Auriol, covering property in Camrose, I beg to advise you that this certificate is on file in this office.

"Your obedient servant,
"A. Y. Blain, Registrar."

As to the production of the plaintiff's certificate of title, he did all he was required to do under the circumstances. The certificate covered other lots, and depositing it with the Registrar for the purpose of registration of the transfer to the defendants was quite justified.

I am of the opinion, however, that the defendants were quite within their rights in demanding an abstract of title and a certificate from the Registrar that there were no executions registered against the vendor.

"The vendor is bound to shew and make good title in accordance with the contract:" Encyc of Laws of England, 2nd ed., vol. 14, p. 452. "The terms conferring on the pur-

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chaser a right to a good title are conditions for the benefit of the purchaser:" Fry, 4th ed., p. 160. "In every contract for sale of land a condition is implied for a good title:" Fry, 4th ed., p. 159. And Williams on Vendors and Purchasers, vol. 1, p. 555, enunciates the general rule "that the vendor must shew a good title, that is, he must prove his right to convey what he has sold;" and on p. 53 of the same text: "If the vendor delay in sending the abstract of title, the purchaser should ask for it."

It seems quite clear that the law in England and also in Ontario requires the vendor to produce at his own expense an abstract of title.

In delivering the judgment of the Court en banc of Saskatchewan, in Mayberry v. Williams, 15 W. L. R. 553, Wetmore, C.J., deals exhaustively with the relative rights of vendor and purchaser when the vendor sues for the purchase-price. There it was held that the vendor was not bound to produce and shew to the defendant an abstract of title before suing for the balance of the purchase-price where the defendant purchaser pays no attention to the contract and does not demand any evidence of title, if at the trial it was found the plaintiff had a good title when he made the demand for payment. The learned Chief Justice, however, quotes with approval Boyd, C., in Cameron v. Carter, 9 O. R. 426: "When an estate is offered generally for sale, the purchaser has a right to assume that the title is good and that it is free from incumbrance, and he has a right to require this to be shewn before he can be compelled to pay any part of the purchase-money." And the inference to be drawn from the judgment in Mayberry v. Williams is, that, when the purchaser is ready to pay his purchase-money and demands an abstract or other evidence of title, the vendor must comply with the demand. The remarks of Wetmore, C.J., in Mayberry v. Williams, as to the relative importance of an abstract under our system of registration and the English and Ontario systems, are very apt in the case before me. Under the latter systems an abstract was a necessity to shew the chain of title. Under our system, it shews at a particular moment the registered owner in fee simple, subject to the incumbrances, if any.

In the case before me, the defendants were content with something less than they were entitled to. The registry office was in Edmonton, and the parties were dealing with



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each other at Calgary. The defendants were content to accept an abstract of title shewing the plaintiff the registered owner free from incumbrances, including arrears of taxes. If they had paid over the purchase-price and received the transfer with the assurance as to title demanded, the defendants would inevitably take the risk of having to deal with executions, caveats, or mechanics' liens that might be recorded against the title in the registry office at Edmonton, between the delivery of the transfer at Calgary and its arrival at the registry office in Edmonton. If the parties stand at arms' length on their absolute rights, it would appear that the purchaser has the undoubted right to notify the vendor that he will appear at the registry office on the date of payment, and will there and then tender the purchaser the price, on receiving the assurances that the vendor has deposited with the Registrar a proper transfer and the vendor's duplicate certificate, and that the title is free of all incumrances. The covenant of the vendor in the agreement for sale, "will immediately thereupon transfer to the purchaser in fee simple the said tract of land," fully bears out this view. The vendor covenants to do all he is able to do to give the purchaser "a title in fee simple free from all incumbrances," that is, to procure the purchaser to become the registered owner of the said land free from incumbrances. These acts of the purchaser and vendor, namely, the payment by the purchaser and the transfer in fee simple by the vendor, are consecutive acts, which are in so close proximity as to be in the practical working out thereof simultaneous. The covenant of the vendor is, "And on payment of the said sum of money . . . the vendor will immediately thereupon transfer to the purchaser the," etc. The purchaser is entitled at that moment to be satisfied of the vendor's ability as well as his intention to transfer the fee simple.

The only remaining question to consider is the request of the defendants to be furnished with a tax certificate shewing no arrears of taxes prior to the 1st January, 1911. It is to be noted that the agreement for sale is dated the 8th March, 1911. The defendants plead, in par. 10 of their defence, "that it was a condition precedent to the right of the plaintiff to recover the sum demanded that he should deliver to the defendants an abstract of title and tax certificate and prove and shew his title to the lands in question," etc.

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Section 43 of the Real Property Act provides "that the land mentioned in any certificate of title granted under this Act shall, by implication and without any special mention therein, unless the contrary is expressly declared, be subject to all unpaid taxes." The effect of this section is, to make unpaid taxes a charge upon the lands. The Municipal Ordinance gives the Municipality of Camrose the right to take proceedings by way of sale when the taxes upon the lands are in arrears for two years. Surely the purchaser is entitled to have an assurance from the vendor that there was no charge upon the lands in the way of arrears of taxes. This is an essential part of the vendor's proof of ability to transfer in fee simple, and should be produced when the purchaser demands it.

I am of the opinion that he is clearly within his rights. The purchase-money and the transfer are in Court, and there will be a reference to the Clerk as to the amount due on the day of trial; and, on payment into Court by the defendants of the balance, if any, found due on account of purchase-price and interest and $3 for transfer under the agreement, the Clerk will investigate the title, and if found by him that there are no arrears of taxes and that he can register the transfer now in Court so as to pass title to the defendants in fee simple, subject to the conditions and reservations expressed in the original grant from the Crown, the amount of purchase-price will be by him paid out to the plaintiff, or his solicitor, and he will deliver to the defendants, or their solicitor, the transfer for the purpose of registration.

Leave to each party to apply to a Judge in Chambers for further directions. The defendants to have the costs of the action.

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## ALBERTA.

SCOTT, J. FEBRUARY 17TH, 1912.

TRIAL.

## THIEN v. BANK OF BRITISH NORTH AMERICA.

*Banks and Banking—"Lien-note" — Assignment to Bank for Present and Future Advances—Invalidity as Regards Property Covered by Lien-note—Bank Act, sec. 76 (2) —Seizure of Property—Detention—Damages—Return—Ratification of Seizure—Counterclaim—Amount of Lien-note—Knowledge of Maker of Assignment — Right to Recover against Maker—Costs.*

In the case reported 19 W. L. R. 549 upon motions for summary judgment and a motion to dissolve an interim injunction, the plaintiff contended at the trial that the advance to S. was made on the security of the assignment by him to the defendant bank of the plaintiff's lien-note and of S.'s interest in the horses mentioned therein; that the assignment of the interest in the latter case was a violation of sec. 76 (2) of the Bank Act; that the assignment was invalid; and that the bank did not thereby acquire any interest in the horses:—

*Held*, that the plaintiff should be allowed to amend his reply so as to raise this issue, it having been raised without objection and considered upon the plaintiff's motion for summary judgment, and all the evidence necessary to decide the issue having been given at the trial.

And *held*, that the advance and the hypothecation and the assignment of the note and of the property mentioned in it were parts of the same transaction; and it must be assumed that the assignment of the property was taken as a security for the advance, and that it was made at least partly on the strength of that security; and, therefore, that the transfer was null and void.

*Bank of Toronto* v. *Perkins*, 8 S. C. R. 603, followed.

The first team of horses seized by the defendant U., under instructions from the defendant bank, was not the team mentioned in the lien-note, and the plaintiff and S. both stated that the second team seized was not that team; and it was contended by the bank that they were not liable for the acts of U. in seizing either team:—

*Held*, that the bank's manager, by his conduct, ratified the act of U. in seizing and detaining the second team; and that the plaintiff was entitled to damages for the detention of the second team; but not for the detention of the first team, as he had by his conduct led U. to seize it.

*Held*, also, that, if the defendants should return the second team to the plaintiff, the latter should be confined to the damages for detention; but, if the team should not be returned, the plaintiff should recover the value as well as the damages.

*Held*, also, that the bank were entitled, upon their counterclaim, to recover from the plaintiff the amount of his lien-note and interest. The plaintiff was aware that the note was transferred by S. to the bank as security, not only for the payment of the $250 then advanced, but also for any future indebtedness or liability as indorser or otherwise. S. was still indebted to the bank as indorser of a

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**note for $200; and, therefore, the bank were entitled, as against the plaintiff, to recover the full amount of his note and interest, subject only to the liability to account to S. for any excess they might receive over the amount of his liability. The fact that the assignment of the property covered by the note was considered invalid was no bar to the right to recover upon the note itself.**

***National Bank of Australasia* v. *Cherry*, L. R. 3 P. C. 299, 307, followed.**

**Question of costs considered.**

Action by Alfred Thien against the Bank of British North America and Israel Umbach for damages for the unlawful seizure and detention of four horses, the property of the plaintiff.

O. M. Biggar, for the plaintiff.

G. B. O'Connor, for the defendants the Bank of British North America.

L. W. Brown, for the defendant Umbach.

SCOTT, J.:—On the 20th June, 1911, the plaintiff purchased from one Shwalbe a team of horses described as a black gelding and a gray gelding, and gave him a lien-note thereon for $550, payable on the 1st October, 1911. On the same day Shwalbe, in the presence of the plaintiff, borrowed $250 from the defendant bank, giving his own notes therefor and at the same time and as part of the same transaction he transferred the plaintiff's lien-note to the bank, and indorsed thereon an assignment of his interest therein and in the moneys payable thereunder and all his right, title, and interest in and to the property therein mentioned. Also at the same time, and as part of the same transaction, Shwalbe, by writing, pledged the lien-note to the bank as a continuing collateral security for, among other things, payment of the then present or any future liability of the pledgor on his own behalf, or as guarantor or indorser for another.

On the 13th July, 1911, Shwalbe obtained a further loan of $155 from the defendant bank, and gave his own promissory note therefor, payable one month after date, and on the 27th July, 1911, one Jannsen obtained a loan of $200 from the defendant bank, and gave his promissory note therefor, indorsed by Shwalbe.

On the 25th September, 1911, the defendant bank's manager at Edmonton wrote to the defendant Umbach, enclosing the plaintiff's lien-note and instructing him to seize the horses mentioned in the lien-note. On the 2nd

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October following, Umbach went to the plaintiff's farm, and there seized a team of horses, believing them to be the horses mentioned in the lien-note, and removed them from the premises. From information he afterwards obtained, he was led to believe that he had seized the wrong team. and on the 7th October, without returning the team alalready seized by him, he again went to the plaintiff's farm, and there seized and removed another team. The team first seized and removed was returned to the plaintiff on the 21st October; but the defendants still retain possession of the second one.

The evidence leaves it at least open to doubt whether either of the teams seized by the defendant bank was the team mentioned in the lien-note; but, owing to the view I entertain upon another question arising in the case, it is unnecessary for me to decide that question.

It was contended on behalf of the plaintiff that the advance to Shwalbe of the $250 was made on the security of the assignment by him to the bank of the plaintiff's lien-note and of Shwalbe's interest in the horses mentioned therein; that the assignment of the interest in the latter case was a violation of sec. 76 (2) of the Bank Act; that such assignment was, therefore, invalid; and that the bank did not thereby acquire any interest in the team. Counsel for the defendants objected that that issue was not raised by the pleadings. Upon referring to the pleadings, I expressed the view that it had not been raised, whereupon the plaintiff's counsel applied to amend his reply by raising that question.

I think the amendment is one that should be allowed, in view of the fact that upon an application by the plaintiff for judgment heard by Beck, J., in November last, that question appears to have been raised without objection and considered by him (see 19 W. L. R. 549); and that all the evidence necessary to decide that issue was given at the trial.

In National Bank of Australasia v. Cherry, L. R. 3 P. C. 299, and Ayres v. South Australian Banking Co., ib. 548, the effect of a provision in the charters of those banks, similar in substance to the provision of the Bank Act I have referred to, was considered and commented upon. Lord Cairns, in the first case, expressed the view that a security taken under those circumstances would be void; while Lord Justice Mellish, in the latter case, expressed

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the contrary view, viz., that it would not prevent the property in the goods passing to the bank.

Both these cases, however, were considered in Bank of Toronto v. Perkins, 8 S. C. R. 603, and the Supreme Court of Canada adopted the view expressed by Lord Cairns, and held that, under a similar provision of the Bank Act then in force here, a transfer of a mortgage to the bank to sesecure an advance upon a promissory note, discounted at the time of the transfer, was null and void.

I cannot draw any distinction between the circumstances of the present case and those which appear in Bank of Toronto v. Perkins. It is true that Mr. Henderson, the manager of the defendant bank, states that he made the first advance of $250 on condition that Shwalbe hypothecated the plaintiff's lien-note as security; but I have already held that the advance and the hypothecation and the assignment of the note and of the property mentioned in it were parts of the same transaction; and, that being the case, it must, I think, be assumed that the assignment of the property was taken as a security for the advance, and that it was made at least partly on the strength of that security.

The first team seized was not the team mentioned in the lien-note. The plaintiff and Shwalbe both state that the second team seized was not that team, and they further state that the team covered by the note was taken away by them, in order that it should no be taken by the bank under the note, and was afterwards sold by them. When the first team was seized, the plaintiff offered no objection. In fact, he admits that he was desirous that the bank should take it, as it was an inferior team to that mentioned in the note. When the second team was seized, the only objection he raised was, that, before taking it, they had not returned the first one. I was not favourably impressed by the evidence of either the plaintiff or Shwalbe, and it appeared to me that, before they became aware of any defect in the bank's claim to the team, they were acting in concert in endeavouring to prevent the bank obtaining possession of it.

Mr. Henderson's instructions to the defendant Umbach were to seize the team mentioned in the lien-note; and it was contended on behalf of the bank that, as the plaintiff states that neither of the teams seized was that mentioned in the note, the bank are not liable for the acts of Umbach in seizing either team.

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The evidence shews that Mr. Henderson, by his subsequent conduct, ratified the act of Umbach in seizing and detaining the second team, and the latter states that Henderson told him not to take the first team back until he saw that he had the right team.

During the trial, counsel for the plaintiff stated that, in the event of my finding that the defendant bank was not entitled under the lien-note to seize the second team, he was willing to take it back and to accept damages for its detention only.

The plaintiff admits that he was willing that the bank should take the first team seized, and states that he thought that, if he could palm off an old crippled team for the one in the note, he would let Umbach take it. I, therefore, think that he should not be awarded damages for the detention of that team. For the detention of the second team I award him $230, being at the rate of $2 per day for each week day since the seizure. I fix the value of the second team seized at $500.

I give judgment for the plaintiff for $730 and costs, subject to the proviso that, if the defendants return the team to the plaintiff within fifteen days, the plaintiff shall be entitled to judgment for $230 only, with costs on the higher scale.

The defendant bank counterclaim for the amount of the plaintiff's lien-note and interest, and for the delivery up of the horses mentioned therein.

I am of opinion that the defendant bank are entitled to judgment for the amount of the note and interest. I hold that the plaintiff was aware that the note was transferred by Shwalbe to the bank as security, not only for the payment of the $250 advanced, but also for any future indebtedness or liability as indorser or otherwise. The latter is still liable to the bank as indorser of the Jannsen note for $200, which is still unpaid; and, therefore, the bank are entitled, as against the plaintiff, to recover the full amount of his note and interest, subject only to the liability to account to Shwalbe alone for any excess they may recover over the amount of his liability. The fact that the assignment of the property covered by the note is held to be invalid is no bar to the right of the bank to recover upon the note itself. See National Bank of Australasia v. Cherry, supra, at p. 307.

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I give judgment for the defendant bank in respect of their counterclaim upon the plaintiff's note for $571.60 and costs. I dismiss the counterclaim in so far as it relates to the claim for delivery of the horses.

The defendant Umbach counterclaims for the costs and expenses of the seizure and detention of the horses seized by him, and for damages for the wrongful conduct of the plaintiff in depriving him of the possession of the horses covered by the lien-note. I dismiss his counterclaim with costs.

The costs of the motion of the plaintiff for judgment, heard by Beck, J., were reserved by him to be disposed of by the trial Judge. I hold that neither party is entitled to the costs.

The action was set for trial on the first day of the sittings at which it was heard, but, by reason of the fact that the plaintiff changed his solicitors immediately before the trial, he was not ready to proceed at that time. The defendants, upon taxation, will be entitled to the costs occasioned by the plaintiff's delay, and the plaintiff will be entitled only to the same fees for the attendance of his witnesses as if the trial had proceeded on the day fixed for it.

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## ALBERTA.

SIMMONS, J. FEBRUARY 12TH, 1912.

TRIAL.

### COCKSHUTT PLOW CO. v. MACDONALD.

*Negligence—Fall of Wall of Building—Injury to Adjoining Premises—Liability of Owner of Building—Employment of Competent Contractor—Negligent Construction.*

**The defendant, being sued upon a promissory note, counterclaimed damages by reason of the wall of the plaintiffs' building falling upon the adjoining building in which the defendant, as lessee of the owner, conducted a livery business:—**

***Held*, that the plaintiffs, having employed a reliable firm of contractors to construct the building which fell, were not liable to the defendant for the damage occasioned by negligent construction. The maxim *qui facit per alium facit per se* is not to be applied to the case of owner and independent contractor.**

***Reedie* v. *London and North Western R. W. Co.*, 4 Ex. 244. and *Gaylord* v. *Nicholls*, 9 Ex. 702, followed.**

The plaintiffs sued the defendant on a promissory note made by the defendant in favour of the plaintiffs for $188.30, and the defendant counterclaimed for $2,000 dam-

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ages caused by the wall of the plaintiffs' building falling upon the adjoining building in which the defendant, as lessee of the owner, conducted a livery business.

J. B. Roberts, for the plaintiffs.

E. F. Ryan, for the defendant.

SIMMONS, J.:—The defendant proved conclusively that he was prevented from carrying on his business for about ten days after the accident while the débris and broken walls were being removed from the premises occupied by him; also, that his trade fell off as a consequence of the interruption; and that the accident thereby occasioned a considerable loss to him.

The plaintiffs say that they are not responsible for the damage occasioned to the defendant through the fall of the wall of the plaintiffs' building.

The evidence shews that the plaintiffs employed a reliable firm of contractors, the Alberta Building Company Limited, to construct a brick warehouse on their premises, according to plans prepared by a firm of architects in Winnipeg, and the building was constructed under the supervision of Mr. Lawson, an architect in Calgary. The construction began in the summer of 1906, and the contract called for completion on the 15th January, 1907. The building was not completed at this date, and construction of the wall was carried on when the temperature was about 30 degrees below zero. On the 12th June, 1907, the east wall fell, and the cause was found to be defective construction. John T. Bawden, a witness for the defence, who cleared away the fallen material and helped to reconstruct the wall, says that the accident was due to construction in cold weather and defective material—there was air-slaked lime which had slaked in the wall. He found frozen mortar in the fallen wall and ice in the mortar. Another of the defendant's witnesses, W. D. McKay, who was working on the building the day preceding the accident, says it was built in the frosty weather, and the wet season following caused it to fall.

The doctrine of "qui facit per alium facit per se" cannot be applied to the owners in this case. The contractors were not their servants within the meaning and application of the maxim. A very full discussion of the law to be applied to such a set of circumstances as arises here will be found in ch. 3 of Beven on Negligence, Canadian edition.

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The earlier cases inclined to favour the view that a person is answerable for injury arising out of the execution of a work which he has employed another to do, and to eliminate the distinction between a contract and a servant. Bush v. Steinman, 1 B. & P. 404, is the leading case setting out this view.

The Courts have gradually withdrawn from this view, and the law as laid down in Reedie v. London and North Western R. W. Co., 4 Ex. 244, correctly sets forth the law to be applied in such cases. There a company, empowered by Act of Parliament, contracted with certain persons to construct a portion of the line, and reserved to themselves the power of dismissing any of the contractors' workmen for incompetence. The workmen, in constructing a bridge over a highway, negligently caused the death of a person passing along under the highway by allowing a stone to fall on him. An action against the company by the administratrix of the deceased failed, and it was held that the terms of the contract did not make any difference. Rolfe, B., said: "The liability of any one other than the party actually guilty proceeds on the maxim qui facit per alium facit per se. The party employing has the selection of the party employed; and it is reasonable that he who made choice of an unskilful or careless person to execute his orders should be responsible for any injury resulting from the want of skill or care of the person employed; but neither the principle of the rule nor the rule itself can apply to a case where the party sought to be charged does not stand in the character of employer to the party whose negligent act caused the injury."

This view is approved in Gaylord v. Nicholls, 9 Ex. 702 —a case where the facts are almost identical with those in the present one. In Gaylord v. Nicholls, the defendant contracted with a builder to erect buildings on the border of his land, which abutted the land and buildings of the plaintiff. In doing the work, the plaintiff's wall was thrown down, and bricks and other material fell on the defendant's land, and were carted away by the contractor's workmen. Parke, B., reversing the County Court Judge's instructions to the jury, said: "I am clearly of the opinion that no action would lie unless he (the defendant) carried away the materials himself, or unless that was done by some servant authorised by him to do so as his servant."

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There will be judgment on the plaintiffs' claim for the amount of the promissory note, $188.30, and interest and costs.

The defendant's counterclaim is dismissed with costs.

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## SASKATCHEWAN.

NEWLANDS, J. FEBRUARY 9TH, 1912.

TRIAL.

### HASTINGS v. DUNBAR.

### DAVIES v. DUNBAR.

*Costs—Jury Trial—Verdict for Nominal Amount—Scale of Costs—Set-off—Rule 95 (721).*

**Upon the trial of the two actions before a Judge and jury, verdicts were given for nominal amounts; and the Judge made no order as to costs, leaving the costs to follow the event and be taxed under Rule 95 as it was before the 1st January, 1912, *i.e.*, the plaintiffs' costs on the lower scale and no set-off to the defendant.**

Motions by the plaintiffs and defendant respectively for costs after the trial of the actions before NEWLANDS, J., with a jury, and verdicts for nominal amounts.

J. A. Allan and N. J. Lockhart, for the plaintiffs.

C. E. D. Wood and W. J. Perkins, for the defendant.

NEWLANDS, J.:—In these cases I make no order as to costs, and the costs will therefore follow the event and be taxed under Rule 95 of the Consolidated Rules of the Supreme Court, now Rule 721 of the Rules of Court. Rule 95 applied to all cases in the Supreme Court, and provided that, unless the plaintiff recovered more than $200, his costs should be taxed on the lower scale of the Supreme Court tariff, unless the Judge otherwise ordered. The jury having given a nominal amount in each of these cases, I see no reason why I should make an order in the plaintiffs' favour as to costs; on the other hand, I see no reason why the defendants should have a set-off of costs, there being no merits on their side. There will, therefore, be no set-off, the plaintiffs' costs being taxed on the lower scale.

I am deciding this question under this Rule as it was before the 1st January, its application being changed since that date.

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## SASKATCHEWAN.

NEWLANDS, J. FEBRUARY 10TH, 1912.

CHAMBERS.

### TORONTO GENERAL TRUSTS CORPORATION v. MUNICIPAL CONSTRUCTION CO.

*Discovery—Examination of Officer or Servant of Defendant Company—Rules 278, 279—Foreman of Works—Cessation of Employment.*

**In an action against an incorporated company to recover damages for the death of the plaintiffs' intestate while in the employment of the defendants in their works, by reason of the negligence of the defendants as alleged, the plaintiffs sought to examine for discovery a man who was the foreman for the defendants in their works at the time of the occurrence, but had ceased to be in their employment:—**

***Held,*** **that the foreman was not a former officer of the company who could be examined under Rule 278; and, being no longer in the company's service, he could not be examined as a servant under Rule 279.**

Application by the plaintiffs for an order for the examination of one Ross for discovery as an officer or servant of the defendant company.

T. S. McMorran, for the plaintiffs.

C. Hoffman, for the defendants.

NEWLANDS, J.:—Application to examine for discovery one William Ross, who, on the date of the accident for which the action was brought, was the foreman for the defendant company on the work where the accident occurred. Ross left the employment of the defendant company



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in the month of February, 1911, and is not now in their employ. Rule 278 authorises the examination for discovery of any one who is or has been one of the officers of the company, and Rule 279 authorises the examination of any officer or servant of the company. In the case of an officer of the company, he may be examined if he is or has been such officer, but in the case of a servant he must be at the time of the examination in the company's employment. The person in question, Ross, was employed as a foreman in charge of some work the defendant company was doing. His authority would necessarily be limited to the men over whom he would be placed; and he is in no sense an officer of the company. In fact he has nothing to do with the company itself—only with a piece of work they are doing. Not being an officer of the company, he can only be examined for discovery if he is in their employ at the time of the examination. Ross, not being in the company's employment, cannot therefore be examined, under Rule 279. Costs in any event to the defendants.

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## SASKATCHEWAN.

WETMORE, C.J. FEBRUARY 10TH, 1912.

TRIAL.

### HEINTZMAN & CO. LIMITED v. RUNDLE.

*Sale of Goods—Written Order—Oral Acceptance—Binding Contract—Construction of Document—Time for Delivery—Action for Purchase-price—Acceleration of Payment.*

The defendant signed a partly printed and partly written document in which he asked the plaintiffs to supply him with a piano (described) and to deliver it by shipping it addressed to the defendant at (here the space left for the place was not filled in) on or about the (here the space left for the date was not filled in), "for which I agree to pay you . . the sum of $800 with interest . . . as follows: cash $200 when delivered and $150 every following three months until paid in full." There was also a clause authorising the plaintiffs, on default, to declare the whole price payable, and to enter suit for the same, and to retake "possession of the piano so sold to me;" and another clause, that "this order shall not be subject to countermand or revocation:"—

*Held*, that, as no time was mentioned in the order for delivery of the piano, it was to be delivered within a reasonable time after the date of the order.

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*Held*, also, upon the evidence, that it was the intention of the defendant to purchase the piano, and that it was left in the plaintiffs' ware-room to suit the convenience of the defendant until he got a room ready to place it in.

*Semble*, that the document signed was not merely an order for the shipping or delivery of the piano, but evidenced an absolute sale of it.

*Held*, however, assuming that the document was merely an offer, that, upon the evidence, it was accepted by the plaintiffs, and the acceptance communicated to the defendant, before it was countermanded by the defendant; and, therefore, there was a binding contract; and the defendant was liable, under the acceleration clause, for the whole purchase-price.

*Ellis* v. *Abell*, 10 A. R. 226, 251, followed.

Action for the price of a piano.

C. E. Armstrong, for the plaintiffs.

W. F. Dunn, for the defendant.

WETMORE, C.J.:—On the 27th April, 1910, the defendant ordered from the plaintiffs a D Grand piano which was then lying in the plaintiffs' ware-room in Moose Jaw: at the time of the purchase he signed an order, the material part of which is as follows: "*Moose Jaw, April 27th, 1910.* Messrs. Heintzman & Co. Limited, Piano Manufacturers, Toronto, Ont. Please supply me with one of your style *D Grand* pianos and deliver it to me by shipping it addressed to me at R. R. Station on or about the day of 19 , for which I agree to pay you in *Regina* the sum of *$800*, with interest at the rate of eight per cent. per annum payable as follows: *Cash $200 when delivered and $150 every following three months until paid in full.* If payments are not made when due they shall bear interest at 8 per cent. per annum until paid."

The parts of the order above set out were printed except the portions italicised, which were written by indelible pencil; there were some further provisions following the portion above set out, which were all in print, but they are not material to the matters in question herein, except a clause authorising the plaintiffs, on any default in payment or other breach of the agreement, to declare the whole price payable and to enter suit for the same and to retake "*possession of the piano so sold* to me" (the defendant), and another clause which is as follows: "I further agree that this order shall not be subject to countermand or revocation."

It will be observed that the blanks in the order left to be filled in with the name of the place to which the piano was

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to be addressed, and the date on or about which it was to be shipped, were not filled in, and, it seems to me very clearly, for a very obvious reason, namely, because the piano was not to be shipped from any one point to any other point, inasmuch as it was in Moose Jaw when the order was signed. I hold that no time was mentioned in the order for delivery of the piano; and, therefore, according to such order, it was to be delivered in a reasonable time after the date of the order. The question of the time of delivery was, however, verbally discussed between the plaintiffs' agent, and the defendant; the defendant swore in effect that he gave the order merely by way of obliging the plaintiffs' agent, Craig, to help his month's business, and make a good shewing to the plaintiffs; and if he (the defendant) wanted to take the piano he could do so some time later, but it was not to be sent to him until he gave the plaintiffs notice to send it; or, in other words, that, at the time of signing the order, it was understood that there was no present intention on the part of the defendant to take the piano at all, but that he might later on make up his mind to do so, and, if he did, he was to notify the plaintiffs' agent.

I am unable to accept that version of the transaction.

Craig swore that the matter of delivery was discussed; that the defendant represented that the room in which he proposed putting the piano was not completed, and he might not have it completed for two weeks, or probably longer—it might be four or five weeks; and he (Craig) sold the piano subject to be delivered within that certain time mentioned in which the room would be completed, that is, from two to five weeks.

I find that the arrangement respecting the delivery was as so stated by Craig. The arrangement, however, was at variance with the terms of the written document, whereby, as I have stated, the piano was to be delivered within a reasonable time after the date of the order.

I also find that, at the time the order was signed, it was the intention of the defendant to purchase the piano; and that it was left in the plaintiffs' ware-room to suit the convenience of the defendant, until he got his room ready to place it therein.

I am, under all these circumstances, strongly of the opinion that the document signed was not merely an order for the shipping or delivery of the piano, but constituted an

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absolute sale of it. However, I will not put my judgment on that ground (I merely suggest it).

I find that there was an acceptance of the offer (assuming that the document was merely an offer) by the plaintiffs before it was countermanded. The plaintiffs held the piano at the disposal of the defendant from the date of the order until about the 1st June then next following. The defendant was then asked by the plaintiffs' agent, Coan, when they could expect him to take delivery of it. That was a point of intimation and notice that the plaintiffs accepted the order and were prepared to make delivery. The defendant did not then repudiate the order or countermand it; on the contrary, he stated that he was not then ready for it, and would be glad if the plaintiffs would hold it a little while longer—a distinct recognition that they were holding it for him. Coan again saw him but a week after that, and asked him practically the same question, when he was told that he was not ready for it. The defendant was approached by the agent twice after that, but he never countermanded or repudiated the order until about the 24th September, when the plaintiffs were about to deliver the piano at his rooms. I find the facts as above stated, and that there was an acceptance of the order, of which the defendant had notice, and therefore a binding contract long before the defendant countermanded the order, and it was too late when he attempted to do so.

In Ellis v. Abell, 10 A. R. 226, at p. 251, Burton, J.A., lays down the following: "Where a proposal is made in writing and accepted in terms by the party to whom it is addressed, whether verbally or *by acting upon* it, it is a written contract." This is supported by Reuss v. Picksley, L. R. 1 Ex. 342.

No question was raised as to there being a delivery on the 24th September, when the piano was taken to the building where the defendant had his rooms and left in the hall there. It was admitted that that was sufficient delivery if there was an agreement binding the defendant. I do not feel called upon, therefore, to discuss that question, and it was not disputed that, under the acceleration, the plaintiffs would, if there was a binding contract, be entitled to recover the whole amount of the purchase-price.

Having reached this conclusion, it is not necessary to consider what would have been the effect of the clause pro-

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viding that the order should not be subject to countermand or revocation, if the offer had not been accepted by the plaintiffs.

There will be judgment for the plaintiffs for $913.93, with costs.

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## SASKATCHEWAN.

WETMORE, C.J. FEBRUARY 14TH, 1912.

TRIAL.

### NARGANG v. NARGANG.

*Husband and Wife—Action for Alimony — Settlement—Agreement for Maintenance—Breach—Enforcement of Charge on Land—Justification for Wife Leaving Husband—Adultery and Desertion—Meaning of "Leave"—Evidence of Misconduct—Hearsay—Admissibility—Discontinuance of Former Action.*

The plaintiff sued the defendant for alimony; the action was settled, the parties entering into an agreement under seal, whereby the plaintiff undertook to withdraw the action, to return to the defendant as his wife, and to release him from all claims; and whereby the defendant covenanted to receive the plaintiff back, to pay her costs of the action for alimony, and that, in the event of her being at any time compelled for good cause to leave and live separate and apart from him, he would provide her, during the term of her natural life, with a suitable living-room, and would pay to her, in lieu of alimony or maintenance, $400 a year; and he created a charge upon certain lands belonging to him as security for the performance of his covenants:—

*Held*, in an action to enforce the charge, that the plaintiff was justified, by the defendant's conduct shewn in evidence, in leaving him six days after she returned to him pursuant to the agreement; and, as he had not paid the costs, nor for a living-room, nor any part of the $400 a year, she was entitled to enforce the charge upon the land, by sale.

*Held*, also, that, although the defendant might be said to have left the plaintiff, nevertheless, within the spirit of the agreement, she left him, that is, she refused and ceased to cohabit with him.

*Held*, also, that testimony given by the plaintiff at the trial to the effect that she had been told by her daughter of adulterous relations between her husband and another woman, was admissible.

*Held*, also, that the formal discontinuance of the action for alimony was not a condition precedent to the right of the plaintiff to bring this action.

Action to enforce a charge on land.

J. F. Bryant, for the plaintiff.

G. F. Blair, for the defendants.

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WETMORE, C.J.:—The defendant Nargang and the plaintiff are husband and wife. The other defendants lodged a caveat with the Registrar of Land Titles against the property sought to be charged herein, subsequent to the registration of the plaintiff's charge which she is seeking to enforce. All the defendants appeared, but only the defendant Nargang filed a statement of defence.

As appears by a portion of the statement of claim, which is admitted by the defence to be true, the plaintiff brought an action for alimony against the defendant Nargang. This action was settled on the 25th April, 1911, and, in pursuance of such settlement, the parties entered into an agreement under seal, the portions of which that are material to this action are as follow:—

"Whereas there have arisen unhappy differences between the parties of the first and second parts, between whom there exists the relationship of husband and wife, which said differences have resulted in an action for alimony being brought by the party of the second part against the party of the first part.

"And whereas the parties of the first and second parts have settled their difficulties in the manner and on the conditions hereinafter provided.

"Now therefore this indenture witnesseth that, in consideration of the premises, of the mutual covenants hereinafter contained, and of the sum of one dollar of lawful money of Canada, now paid by the party of the first part to the party of the second part (the receipt whereof is hereby by her acknowledged), the party of the second part covenants and agrees to and with the party of the first part, that she will, on the execution of this indenture, withdraw and discontinue the action now pending in the Supreme Court of Saskatchewan, wherein the party of the second part is plaintiff and the party of the first part is defendant.

"That she will return to the home of the party of the first part, and assume and discharge the duties of a wife to him, and act and comport herself at all times as a wife should.

"That she will release and hereby does release the party of the first part from all claims that she now has against him, arising out of the marriage relationship, or otherwise, and hereby agrees to accept and does accept the provision made for her in and by this indenture as in full satisfaction of all claims that she now has to support or maintenance from the

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party of the first part, or her right to a share or interest in his estate, real and personal, or to the lands and personal properties now in his name or in his possession, either during his life or after his decease should she survive him.

* * * * * * * *

"The party of the first part covenants and agrees to and with the party of the second part that, in consideration of the foregoing covenants of the party of the second part, he will receive the party of the second part back and will restore and continue to her all her rights and privileges as his wife, and will support and maintain her as such and in accordance with his means and station in life.

"That he will, in the event of the party of the second part being at any time compelled for good cause to leave and live separate and apart from him, provide her, during the term of her natural life, with a suitable living-room in the city of Regina, sufficiently furnished, and will pay to her, in lieu of alimony or maintenance, the yearly sum of $400, payable quarterly, the first payment to be made at the end of three months from the date on which the party of the second part shall be compelled to leave as aforesaid.

* * * * * * * *

"That he will pay the taxed costs of the party of the second part in said action for alimony, up to the date of this indenture, and the costs of preparing and registering this indenture as herein provided.

"And the party of the first part further covenants and agrees to and with the party of the second part that for the better securing of the provision herein made for the party of the second part, this indenture shall be registered against the following lands, of which the party of the first part is the registered owner, namely, all and singular those certain parcels or tracts of land and premises situate lying and being in the city of Regina, in the province of Saskatchewan, and being composed of lots numbers 27, 28, 29, 30, and 31 in block number 248, in the city of Regina, in the province of Saskatchewan, according to plan No. old 33.

"Provided that, should the party of the first part make default for a period of thirty days in any of the terms of this agreement, in maintaining the party of the second part, either in his home as his wife, or while she is living separate from him for good cause, or should provision not be made

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for her out of the estate of the party of the first part, in the event of her surviving him, then the party of the second part shall have all the rights under said agreement of a mortgagee under a mortgage against the said lands, and may distrain, sue for, and recover said annuity, or may proceed by way of sale or foreclosure under the terms of said agreement as though the same were a mortgage.

"Provided, further, that, should the party of the second part at any time hereafter leave the home of the party of the first part without good cause, or should she neglect or refuse to discharge her duties as the wife of the party of the first part to the extent of her strength and ability, or act otherwise than as the true and lawful wife of the party of the first part, then she shall surrender, release, and forfeit all her rights under this agreement, and also all the rights which by the terms hereof she now releases."

The plaintiff brings this action alleging that, owing to the defendant Nargang (whom I will hereafter call "the defendant") having left and deserted her and to his living in adultery with one Mollie Nargang, she was compelled to live separate and apart from him, and claims to have the agreement enforced as a charge against the land, both in respect of the annuity and living-room referred to, and for the recovery of the taxed costs of the first action.

Some portions of the plaintiff's testimony must be entirely wrong in minor particulars, but enough essential facts are established to my satisfaction to warrant my granting the relief prayed for. The plaintiff is evidently a very ignorant woman, and she has the misfortune to be united in marriage to a husband who, I am sorry to say, cannot command very much respect. That is abundantly clear.

Taking what is admitted by the pleadings and shewn by the evidence together, it is established that, immediately after the execution of the agreement sued on, the defendant resided for about six days, up to the 1st May, with the plaintiff in a house in Regina, in which she had been, for some time previous, and up to the time of the settlement, residing. Just about the expiration of this time, Mollie Nargang came to Regina, and the plaintiff saw the defendant with her in a bed-room in the house of a Mrs. Ritter. She was crying, and the plaintiff said: "You crying for my husband. I have cried before; now you can cry." The defendant, the day after this, left the plaintiff. Previous to his going, he sug-

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gested that she live in a room or apartment in his building, being the Nargang block, the premises charged by the agreement in question. She went up to look at the room indicated, and there was no furniture or conveniences in it, and she told him so, and she said to him, "If you pay rent where I am living, I might as well stay where I am." He consented to that. The defendant never did pay this rent or any part of it. He never after that gave her any supplies or necessaries, or provided her with a place to reside. He came back once afterwards when she was sick, and offered to take her to the hospital; and he came back afterwards and offered to take her to his house on his farm. She refused to go, and for a very good reason. As a matter of fact he was all this time residing with Mollie Nargang. I hold, therefore, that the defendant did not support and maintain the plaintiff in accordance with his means and station in life, or at all, since he left her as hereinbefore stated. The fact which entirely justifies the plaintiff in refusing to go to his house or to live with him is his adulterous relations with Mollie Nargand.

I feel somewhat handicapped in dealing with this branch of the case, because I do not know upon what grounds the action for alimony which was settled was based. I may surmise, but I cannot give effect to any mere surmise. I must say that I think that the learned counsel for the plaintiff was possibly mislead by a ruling by me in the early stage of the trial, and therefore did not prove the grounds of the first action. The testimony of the plaintiff was the first offered; and he proceeded to establish by her the reason why she left the defendant before the first action was commenced. This was objected to, and I held that he must start with the agreement on which the present action was based. I never intended by that ruling to hold that, in no stage of the case and under no circumstances, could he shew the state of matters between the parties or the grounds on which the first action was founded. As a matter of fact, I was of opinion that, as the evidence developed, it was altogether likely that all this might be received in evidence. It was never tendered.

However, enough is established to satisfy me. For 15 months, at any rate, prior to the settlement of the 25th April last, the defendant had been living in open adultery with Mollie Nargang, his aunt by marriage, and immediately after he left his wife, on the 1st May, he went back

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to Mollie Nargang and resumed his adulterous relationship with her. That was good cause to compel the plaintiff to leave the defendant and to live separate and apart from him. No woman who had any respect for herself would submit to such treatment unless it was under such circumstances that she could not help herself.

It was urged that the defendant is not bound under his covenant to pay the annuity provided for therein or to provide her with a suitable room because she never left him since the agreement—that he left her. I am of opinion that, within the spirit of the agreement, she did leave him; that is, she refused and ceased to cohabit with him.

It is also urged that there is no evidence that the plaintiff was, at the time, aware of the relations between the defendant and Mollie Nargang. I am inclined to think that that was not necessary. However, she had notice of these relations. Evidence was given on the part of the plaintiff that her daughter had informed her of these relations. On objection being taken, I ordered this evidence to be struck out. I am of opinion that I was wrong in doing so. How would a woman, under ordinary circumstances, situated as she was, obtain knowledge otherwise? If she acted on it, however, it would be at her risk; if it turned out incorrect, that is, was not established by sworn testimony, it would avail her nothing. If, however, it was established to be true, she would be justified in acting under it. The fact that I struck this testimony out, however, was cured, because counsel for the defendant brought it out in cross-examination.

The defendant has not paid the taxed costs of the first action as agreed. He has not supplied the plaintiff with a suitable living-room, as provided. The first action was not formally discontinued until after this action was commenced, but no proceedings were ever taken in it after the settlement, and it was formally discontinued on the 17th November, 1911. The formal discontinuance was not a condition precedent to the right of the plaintiff to bring this action.

I find that the defendant is indebted to the plaintiff in respect of the annuity mentioned in the third paragraph of the statement of claim, being for 9 months thereof, from the 1st May, 1911, to the 1st February, 1912 ..... $300 00

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| | |
|---|---|
| For an amount required to provide a suitable living-room for her, as set out in the same paragraph, for the said period of 9 months.. | 135 00 |
| For the taxed costs mentioned in the 8th paragraph of the statement of claim ..... | 116 12 |
| | $551 12 |

Declare that the plaintiff is entitled to a charge upon the lands mentioned in the second paragraph of the statement of claim for the payment of the moneys so found due to her.

Order that the defendant pay into Court to the credit of this cause, within one month from this date, the amount so found due as above, with the costs of this action, to be taxed; on default, that he be foreclosed and barred of all right and title in said lands, and that the title thereto be vested in the plaintiff, subject, however, to any rights registered prior to the registration of the said agreement of the 25th April, 1911.

Declare that the annuity above-mentioned and the amount to provide the plaintiff with a suitable living-room are payable by instalments; and that the plaintiff have liberty to apply in Chambers in respect to future instalments as they fall due.

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## SASKATCHEWAN.

WETMORE, C.J. FEBRUARY, 15TH, 1912.

### GEERS v. NESTMAN.

*Malicious Prosecution — Foundation for Charge Laid — Absence of Belief on Part of Defendant—Want of Reasonable and Probable Cause—Malice—Trial without Jury—Finding of Judge.*

Where it is shewn that the defendant in an action for malicious prosecution believed the charge which he laid against the plaintiff to be without foundation, it cannot be ruled that he had reasonable and probable cause for the prosecution.

*Hadrick v. Heslop*, 12 Q. B. 267, followed.

And where the defendant lays a charge which he believes to be without foundation, he must be deemed to be actuated by malice.

In this case, although the facts shewn at the trial would have justified a finding that there was no want of reasonable and probable cause for the prosecution, yet, as the defendant, upon his examination for discovery, swore that he never charged the plaintiff with stealing flax (upon which charge the plaintiff was tried and acquitted), that he never believed that the plaintiff stole it, that he never had any reason to believe that the plaintiff stole it, and that, at the time of

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**the examination, he did not believe that the plaintiff stole it, a Judge, trying the action without a jury, found that there was malice and want of reasonable and probable cause, and gave judgment for the plaintiff.**

Action for malicious prosecution, tried before WETMORE, C.J., without a jury.

N. R. Craig, for the plaintiff.

J. A. Cross, for the defendant.

WETMORE, C.J.: — The defendant charged the plaintiff before a Justice of the Peace with stealing a quantity of flax from him. The plaintiff was arrested upon such charge, brought before a Justice of the Peace, committed for trial, and was tried by a Judge with a jury at the sittings of the Supreme Court held at Moose Jaw in March last, and acquitted. He was held in prison for some time after his committal by the Justice, but was released on bail.

The facts relating to the alleged theft and the conduct of the defendant in respect to the prosecution of the plaintiff are as follows:—

The flax was owned by the defendant, and was stored in bags in the kitchen of a house in his possession. It had been emptied out of the bags and carried away, presumably in a loose state. There were tracks of a horse and waggon and of a person or persons about the door of the place where the flax had been stored, and the tracks of the waggon indicated that it had been backed up to this door, and there were tracks of apparently this same waggon going south from the door. The defendant went to a constable of the Royal North-West Mounted Police force and stated the facts to him, and was instructed by him to take two persons with him to the place from which the flax was stolen and follow the tracks going south. This was done. These tracks went south on a trail which ran practically parallel with, and on the west side of, and close by the road allowance there for a considerable distance, until it joined the road allowance, and along that allowance until it came opposite to the plaintiff's yard, and turned off into that yard. The trackers did not follow the tracks any further, because they had some impression that, in view of what they were doing, it would be improper for them to do so; from which I gathered that they were actuated by some sentiment that it would not shew a proper sense of delicacy to go on the plaintiff's land or into his yard. It may be as well to

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say here that the plaintiff's house and yard were on the east side of the road allowance. When tracing these waggon tracks, they found on the trail, from time to time, places where some grains of flax had fallen; and this was observable all the way until the tracks came to the road allowance. The tracks of apparently two other waggons were observed coming from the plaintiff's yard, which went north along the road enclosure until they came to a point where a trail branched off to go east towards Rouleau; and these tracks went east on that road. They were not followed any further. The defendant's flax was of a much superior quality to the general sample of flax raised in that neighbourhood. But at the same time, as the sequel will shew, there must have been other flax in or about the vicinity equal to it in quality. On the morning of the day on which the defendant missed the flax, the plaintiff and one Frank Sicard together took into Rouleau two loads of flax of a quality exactly the same as that lost by the defendant, and sold it at the elevator there; and the defendant was informed of that fact by the police constable. As a matter of fact, the plaintiff and Sicard arrived at Rouleau about six o'clock in the morning, which must at that time of the year have been before daylight, or possibly about the dawn of the day, and immediately aroused the elevator man to buy it and take delivery of it, which he did. These men must have been travelling several hours before dawn. Sicard lived close to the plaintiff on the west side of the road allowance. The reason given for so travelling at night was that one of them wanted to catch the train to go to Moose Jaw. As a matter of fact, he did not go to Moose Jaw on that occasion, although the train went through more than two hours after they had disposed of the flax. The quantity of flax hauled into Rouleau on this occasion by Sicard and the plaintiff was almost twice as much as the defendant had lost.

The police constable directed the plaintiff to go into Drinkwater, and he did so, and laid the charge in question before a Justice there, with the results before stated.

It was proved at the trial that there was a light trail running east across the country south of the plaintiff's house. I do not know whether this trail was much travelled at that time. I am inclined to think it was not. Passler, one of the trackers, at the time of the tracking went south along the road allowance to a point south-west of the plaintiff's house. He saw no trace of any trail going east, but he admits that,

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later on in the spring or summer, he observed that there was such a trail. Of course, the theory set up by the plaintiff is, that, if the trackers did so trace a track from the place where the flax was stolen leading into his yard, it went on through his yard and joined this trail going east; and that the trackers fell short of making a sufficient search to establish reasonable and probable cause against the plaintiff, because they did not follow the trail into his yard and ascertain whether or not it had gone to that trail and so east. The plaintiff denied stealing the wheat. I do not feel justified under the evidence in finding contrary to the verdict acquitting the plaintiff in March, even supposing it to be open to me to do so. But the facts which I do find, and which are before set forth, are sufficient to lead me to the conclusion that—as an abstract proposition—there was not a want of reasonable and probable cause on the part of the defendant in bringing the prosecution in question.

Had it not been for the testimony of the defendant given on his examination for discovery, I would have dismissed this action instantly. The defendant swore, on that occasion, that he never charged the plaintiff with stealing the flax, that he never believed he stole it, and that he never had any reason to believe he stole it, and that, at the time of the examination, he did not believe that he stole it. In face of the facts, it is almost incredible that he should swear that way; and I may frankly state that I do not believe him. The defendant's counsel attempted to account for it by stating that his client is a very ignorant and stupid man. I entirely agree with him, but that will not account for what he swore to. His evidence in that respect is either true, or he, in my opinion, endeavoured to mislead the Court by false testimony; and, reading between the lines, that is the conclusion I have in my mind reached. He knew that this action was brought against him because he was charged with having accused the plaintiff of stealing the flax, and he conceived the idea that, if he could impress the Court with the fact that he did not believe, and never believed, that the plaintiff stole the flax, and never accused him of doing so, he would score a great point and would succeed in the action; in fact, I think he swore as he did from the low cunning of a very stupid man. But what I believe, under the circumstances of this case, cannot be given effect to (it is only a surmise any way, but a very strong one); I must accept what he says, and has sworn to.

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I must, therefore, hold that in his mind there was want of reasonable and probable cause in bringing and proceeding with the prosecution in question.

In Hadrick v. Heslop, 12 Q. B. 267, which was an action for malicious prosecution, Denman, C.J., is reported, at p. 274, as follows: "It would be quite outrageous if, where a party is proved to believe that a charge is unfounded, it were to be held that he could have reasonable and probable cause . . . I think that belief is essential to the existence of reasonable and probable cause; I do not mean abstract belief, but belief on which a party acts. Where there is no such belief, to hold that the party had reasonable and probable cause would be destructive of common sense." And Erle, J., is reported in the same case, at p. 276, as follows: "The defendant made the charge upon information given to him; it was left to the jury whether he believed that information: and they found that he did not. It would be monstrous to say he had reasonable and probable cause."

That case seems to me exactly in point. In this case, the defendant makes the point stronger, because he swears, in effect, that he did not believe, and never believed, that the plaintiff was guilty.

Shrosbery v. Osmaston, 37 L. T. 792, is along the same lines as what I have cited from Hadrick v. Heslop.

This testimony had a further effect. I cannot, in the face of it, see my way clear to find that the defendant did not act maliciously. Believing as he says he did, what motive was there for laying the information and proceeding with the prosecution? He must have laid it from some improper motive. I, therefore, find there was malice on the part of the defendant.

I find damages for legal and other expenses incurred by the plaintiff in his defence to be $500. This amount was sworn to, and not disputed. The general damages I assess at $200.

There will be judgment for the plaintiff for $700 and costs.

If my surmise is correct, the defendant testified falsely in the matters referred to. Perhaps it may serve to impress upon him, if unfortunately he becomes involved in another lawsuit, not to give false testimony, especially when the truth will serve his purpose better.

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## MANITOBA.

PRENDERGAST, J. FEBRUARY 8TH, 1912.

CHAMBERS.

# REX v. MALI.

*Criminal Law—Summary Trial and Conviction — Jurisdiction of Magistrate—Application for Habeas Corpus — Objections to Conviction and Warrant of Commitment— Consent of Prisoner to be Tried Summarily not Appearing — Statement in Magistrate's Record — Address of Magistrate to Prisoner — Criminal Code, sec. 778 — Penitentiaries Act, sec. 44.*

The defendant was tried and summarily convicted by a magistrate of an offence, and was sentenced to imprisonment, and, being in prison, applied for a *habeas corpus* and *certiorari* in aid:—

*Held*, that the objection that the magistrate exceeded his jurisdiction in convicting and sentencing the defendant was too vague and general to be dealt with.

The second objection was, that the conviction did not shew on its face that the magistrate imparted to the defendant the information required by sec. 778 of the Criminal Code, and so the magistrate's jurisdiction did not appear:—

*Held*, that the objection did not go far enough; for, if any part of the record shewed that the section was complied with, that was sufficient.

It was not alleged that the statutory requirements were not observed by the magistrate, but only that the conviction did not so state. The record, in fact, contained this entry made by the magistrate: "The prisoner consents to be tried summarily:"—

*Held*, that, while it was necessary that the magistrate should address the prisoner in the words prescribed by sub-sec. 2 of sec. 778, or words to the same effect, that was only a preliminary leading to the prisoner's election, which was the essential element; and it was to be presumed, as consent was shewn, that the proper preliminary information had been given; and it was not necessary that the record should so state.

*Rex* v. *Howell*, 19 Man. L. R. 317, and *Rex* v. *Walsh*, 7 O. L. R. 149, distinguished.

The third objection was, that the warrant of commitment did not shew a compliance with sec. 778:—

*Held*, that this objection was answered by the same reasoning as the second objection, and also by sec. 44 of the Penitentiaries Act, with which the precept issued to serve as a warrant of commitment, strictly complied.

Application by the defendant, on the return of a summons, for a habeas corpus and certiorari in aid.

P. E. Hagel, for the defendant.

R. B. Graham, for the Crown.



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PRENDERGAST, J.:—The grounds urged for the applicant are:—

1. That the magistrate exceeded his jurisdiction in convicting and sentencing the prisoner.

2. That the conviction does not shew on its face a strict compliance with the statute, sec. 778 of the Criminal Code of Canada, by shewing that the magistrate imparted to the prisoner the necessary information, as required by the statute, to give the magistrate jurisdiction to try and convict the prisoner.

3. That the warrant of commitment does not shew on its face a strict compliance with sec. 778 of the Criminal Code of Canada, by shewing that the magistrate imparted to the prisoner the necessary information, as required by the statute, to give him jurisdiction to convict and sentence the prisoner.

As to the first ground, it is too vague and general to be dealt with, and I dismiss it for that reason.

As to the second ground, the objection, which is directed to the conviction only, does not go far enough; it should be directed to the whole record. For, if any part of the record shews that the section in question was complied with, that is sufficient, and the conviction should stand. Even considering the matter, conformably with the agreement between the parties, as if the writ of habeas corpus and that of certiorari in aid had issued and been returned, I should say that the conviction only was before me, as that is all that is attacked and not the rest of the record. I think that the application could well be dismissed on that ground alone—that the rest of the record not before me might shew that the section was complied with, although the conviction does not.

But, as a matter of fact, the record contains this entry: "The prisoner consents to be tried summarily." This consent of the prisoner to be tried summarily clearly refers to, and was evidently meant to be in compliance with, the requirements of sec. 778, sub-sec. 3. The consent is the essential thing; it is that which gives jurisdiction; and it is here stated to have been given. It is urged for the prisoner that the record does not state that, before giving his consent, he was addressed by the magistrate in the words prescribed by sub-sec. 2 or words to the same effect. I do not think it is necessary that the record should state this. The magistrate should be presumed to have accepted the prisoner's consent in the proper manner, and only after the necessary preliminary re-

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quirement of addressing him in the manner provided by the Code was complied with. That it is absolutely necessary that the magistrate should so address the prisoner, is over-abundantly established; but still the fact remains that this is only a preliminary leading to the prisoner's election, which is the essential element; and, on proper evidence of the consent having been given, a presumption is established that the preliminary was complied with as it should have been.

It is to be noted that the accused does not in any way allege that the said statutory requirements were not most strictly observed in every particular, but simply that the conviction (and I have allowed the objection to cover the whole record) does not so state. This distinguishes the present case from Rex v. Howell, 19 Man. L. R. 317, and Rex v. Walsh, 7 O. L. R. 149, which came up as stated cases shewing on their face what proceedings had actually been followed before the magistrates; and also from Rex v. Crooks, 17 W. L. R. 560, where the application was supported by affidavits that the statutory provisions had not been followed.

Upon the third ground, I will also dismiss the application, for the reasons first set out herein, and also under sec. 44 of the Penitentiaries Act, with which the precept issued herein to serve as a warrant of commitment, strictly complies.

The application is then dismissed.

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## MANITOBA.

FEBRUARY 12TH, 1912.

COURT OF APPEAL.

## GUNN v. CANADIAN PACIFIC R. W. CO.

*Negligence — Injury to Horse of Plaintiffs in Defendants' Stable — Defective Floor — Knowledge — Taking Risk —Relationship of Parties—Licensor and Licensee—Implied Warranty of Safety.*

**By an arrangement made with the defendants, the plaintiffs' horses were stabled in a stable belonging to the defendants, who charged the plaintiffs 50 cents per day per head for the stabling and feed of the horses. Although the defendants supplied stable accommodation and feed for the horses, the plaintiffs' men attended to and fed them, but there was no one on behalf of the plaintiffs in charge**

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of the horses at night. The stable was, at the same time, used by the defendants for horses in transit over their railway. After the plaintiffs had for some time stabled their horses in the stable, under the above arrangement, one of their horses broke through the flooring of the stall it occupied and received such injuries that it died:—

*Held*, that the relationship of landlord and tenant did not exist between the parties; the relationship was that of licensor and licensee, the license being in consideration of a money payment, or (*per* PERDUE, J.A.) of bailor and bailee.

And *held*, taking the relationship to be that of licensor and licensee, that the defendants impliedly warranted that the stable was reasonably fit and safe for the purpose.

*Francis* v. *Cockrell*, L. R. 5 Q. B. 501, and *Stewart* v. *Cobalt Curling and Skating Association*, 19 O. L. R. 667, followed.

And *held*, that the floor was not in a reasonably safe condition, and that the defendants were liable to the plaintiffs for the loss of the horse; RICHARDS, J.A., dissenting.

It was urged on behalf of the defendants that, because the plaintiffs' man noticed and reported defects in the stable floor, the plaintiffs should be fixed with knowledge of its condition and should be taken to have assented to the risk:—

*Held* (RICHARDS, J.A., dissenting), that this contention could not be maintained; the maxim *volenti non fit injuria* had no application.

*Brabant* v. *King*, [1895] A. C. at p. 641, followed.

*Per* RICHARDS, J.A.:—Assuming that the plaintiffs were licensees, whether for hire or not, they had ample time to see for themselves the condition of the stable; and, before the accident occurred, they knew it and took all risks; to make the defendants liable, the condition must have been known to them, and not to the plaintiffs.

*Bennett* v. *Railroad Co.*, 102 U. S. at p. 380, referred to.

Judgment of DAWSON, Co.C.J., reversed.

Appeal by the plaintiffs from the judgment of nonsuit pronounced by DAWSON, Co.C.J., in an action in the County Court of Winnipeg, brought to recover the value of a horse killed by injuries due to its falling through the floor of a stable belonging to the defendants.

The appeal was heard by RICHARDS, PERDUE, and CAMERON, JJ.A.

W. L. Garland, for the plaintiffs.

W. H. Curle, for the defendants.

PERDUE, J.A.:—The plaintiffs are contractors, and were engaged in the construction of the McPhillips street subway in the city of Winnipeg. They used a number of horses upon the work, and, by an arrangement made with the defendants, the horses were stabled in a stable belonging to the defendants, the latter charging the plaintiffs 50 cents per day per head for the stabling and feed of the horses. Although the defendants supplied stable accommodation and feed for the horses, the plaintiffs' men attended to and fed them, but there was no one on behalf of the plaintiffs in charge of the horses

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during the night. The stable in question was, at the same time, used by the defendants for horses in transit while the same were detained in Winnipeg during their shipment over the defendants' railway. After the plaintiffs had for some time stabled their horses in the defendants' stable, under the above arrangement, one of their horses broke through the flooring of the stall it occupied and received such injuries that it died. The present action was brought in the County Court of Winnipeg to recover damages for the loss of the horse, and the learned County Court Judge entered a nonsuit.

The defendants, besides denying their liability, set up that the stable was leased to the plaintiffs, who undertook to repair or to notify the defendants immediately of any repairs that might be required; that the plaintiffs did not keep the premises in repair, and neglected to notify the defendants of any defect in the flooring.

It is clear that the relationship of landlord and tenant, did not exist between the parties. During all the time the stable was made use of for the plaintiffs' horses, the defendants were also using it for stabling other horses in their charge. The evidence shews that no particular stalls were set apart for the plaintiffs' horses. The defendants' official in charge of the stable said that the defendants utilised every portion of it for horses in transit during the time the plaintiffs' horses were there. The defendants remained in possession and occupation of the stable, and merely supplied accommodation for the plaintiffs' horses.

An attempt was made to prove an agreement with the plaintiffs that they would report to the defendants' agent in charge any defects noticed in the floor of the stable, and that the agent would have them repaired. The evidence failed to prove any such agreement with the plaintiffs. The defendants' agent in charge of the stable requested the plaintiffs' stableman to report any defects he noticed, but there was nothing in the nature of an agreement to report defects, shewn in the evidence.

I think the transaction between the parties in regard to the stabling of the horses was in the nature of a bailment for a reward. The fact that the plaintiffs had charge of the horses and fed them while in the defendants' stable, does not seem to me to be material in dealing with the question of the responsibility assumed by the defendants. They agreed, for a valuable consideration, to furnish stable accommodation and feed

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for the plaintiffs' horses. Whether we regard the arrangement as a bailment for a reward or as a license to the plaintiffs for a valuable consideration, the duties cast upon the defendants are very much alike.

If the defendants were bailees for hire, they were bound to take reasonable care that the building in which the horses were stabled was in a proper state, so that the animals might be reasonably safe: Searle v. Laverick, L. R. 9 Q. B. 122; Brabant v. King, [1895] A. C. 632, 640, 641.

If, upon the other hand, we regard the transaction as a license to the plaintiffs to make use of the defendants' stable and fodder for the purpose of sheltering and feeding their horses, in consideration of a money payment, the defendants impliedly warranted that the stable was reasonably fit and safe for the purpose: Francis v. Cockrell, L. R. 5 Q. B. 501; Stewart v. Cobalt Curling and Skating Association, 19 O. L. R. 667. In these cases persons were injured owing to the unsafe condition of structures which they were invited to use and for the use of which they paid fees. But the rule laid down in Francis v. Cockrell by Montague Smith, J., that the structure has to be in a reasonably safe condition, so far as the exercise of reasonable care and skill can make it so, applies also as against the possessor of a structure to which it is intended that persons should intrust their property, animate or inanimate: Pollock on Torts, 8th ed., p. 512; Lax v. Corporation of Darlington, 5 Ex. D. 28; The Moorcock, 14 P. D. 64; Searle v. Laverick, supra, at p. 129. The judgments in Francis v. Cockrell, in the Exchequer Chamber, shew that a case like the present may be based either upon a breach of an implied contract or upon a breach of a duty imposed on the defendant to have the building reasonably fit for its purpose: pp. 510, 511, 513, 514, 515.

The learned County Court Judge did not give a decision in writing or intimate upon what grounds he entered a nonsuit. It was stated by counsel upon the argument of this appeal that the learned Judge expressed, at the trial, a leaning towards the view that a tenancy had been created. If he decided the case upon that ground, it was unnecessary for him to come to any conclusion upon the evidence as to the condition of the stable or the care taken by the defendants to keep it in a safe condition.

The evidence shews that the floor of the stable was constructed of a single layer of two-inch planks. Under the floor

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there was an open space of three or four feet. The horse in question was a heavy animal, weighing some 1,650 pounds. There is uncontradicted evidence that such a floor is not sufficient or safe for a stable in which heavy horses are kept. The defendants' agent in charge of the building admitted that he knew the floor was not safe. He said: "I never felt very safe, heavy horses being continually in there, you know, wearing the plank, knowing that there was an opening underneath." He asked the plaintiffs' man to report to him any defects he noticed in the floor so that they might be repaired. Defects were reported and these were repaired by being planked over.

It was urged on behalf of the defendants that, because the plaintiffs' man noticed and reported defects in the stable floor, the plaintiffs should be fixed with knowledge of its condition and should be taken to have assented to the risk. This contention is, I think, completely disposed of by the judgment in Brabant v. King, [1895] A. C. at p. 641. Lord Watson, in giving the judgment of the Court, said: "It would be a very dangerous doctrine, for which there is not a vestige of authority, to hold that a depositor of goods for safe custody, who, by himself or his servants, has had an opportunity of observing certain defects in the storehouse, must be taken to have agreed that any risk of injury to his goods which might possibly be occasioned by these defects should be borne by him, and not by his paid bailee. The authorities relating to the vexed maxim 'volenti not fit injuria' have no bearing whatever upon the point."

It is reasonably certain from the evidence that a floor such as was put in this stable would, with the constant use to which it was subjected, develope, and that the floor in question did develope, defects and weaknesses which would endanger the horses placed in the stable. Upon the defects first becoming known to the defendants or their agent in charge, it was their duty to have put the floor in a safe condition and not to have waited for other defects to appear, with the intention of patching them as they did appear. The defect which occasioned the death of the plaintiffs' horse made its first appearance when it actually caused the injury. The defendants, through their agent in charge of the stable, had had ample warning of the unsafe condition of the floor, and should have taken steps to make it safe for the purpose for which it was used,

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so that horses stabled therein, for the keep of which the owners were paying, might be reasonably safe.

I think the nonsuit should be set aside, and a verdict entered for the plaintiffs for $250. The plaintiffs are entitled to the costs in the County Court, including the usual counsel fee, and to the costs of this appeal.

CAMERON, J.A.:—The plaintiffs bring this action to recover the value of a horse killed by injuries due to its falling through the floor of a stable belonging to the defendants. According to one of the plaintiffs, the contract was this: "We put the horses in there, and they were to charge us 60 cents a day for them each; we were to do the feeding and they were to supply the feed." According to the bills rendered and paid, the number of the horses varied from time to time and even from day to day. The plaintiffs had a man who looked after the horses and their feeding. They had also a time-keeper at the stables and a telephone. The man in charge of the horses says he fed the horses and cleaned out the stable, and that he was there all the time during the day, but that no one was there at night. This occupation of the premises lasted several months. Dickson, the defendants' agent in charge of their stockyards, was examined for discovery, and his examination was, in part, put in on behalf of the plaintiffs. He said that he looked after the stables himself, and that his understanding was, that the plaintiffs looked after the horses themselves. Called for the defence, he said that he fully informed Mr. Gunn as to the condition of the stable. He further stated in his examination for discovery and at the trial that he had told the man in charge, if he noticed any defects, to report to him. He also stated that he made inspection of these stables and that he ordered repairs made during the plaintiffs' occupation. Portions of the stables not occupied by the plaintiffs' horses were used for horses in transit.

On these facts, what was the relationship between the defendants and the plaintiffs? It seems to me that it was not that of landlord and tenant. No specific part or parts of the stables were reserved for the plaintiffs. It is impossible, therefore, to say that there was given to the plaintiffs exclusive possession of any part of the stables. It also seems to me that the relationship created between the parties was not that of bailee and bailor. "The chief characteristic of a bail-

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ment is the intrusting of a chattel by a person called the bailor to another person called the bailee, for some purpose, upon a contract, express or implied:" Beal on Bailments, p. 7. There was here no intrusting of the horses by the plaintiffs to the defendants; on the contrary, the plaintiffs did not intrust the defendants with the care and custody of the horses, but undertook to take care of them, and did take care of them, themselves.

It seems to me that the relationship between the parties was akin to that of licensor and licensee, but whether these terms accurately determine the relationship is not important. The plaintiffs were, in effect, invited to come and stable their horses upon the defendants' premises, and the latter, thereupon, assumed an obligation to see to it that the premises were in a reasonably safe condition for that purpose: Francis v. Cockrell, L. R. 5 Q. B. 50; Am. & Eng. Encyc. of Law, vol. 18, p. 1137. Did the defendants fail to exercise ordinary care and diligence to construct and maintain these stables in a reasonably safe condition for occupation by horses, under the circumstances? The fact is, that the horse was killed owing to a defect in the floor of the stall. Res ipsa loquitur, and, the evidence having gone thus far, the burden of proof is shifted: O'Brien v. Michigan Central R. R. Co., 19 O. L. R. 349. The inference can be drawn from the horse's injury and death, under the circumstances, that the floor was defectively constructed or insufficiently maintained, and enough is proved to call for explanation by the defendants. Such explanation is not forthcoming. The defendants have not shewn that the flooring of this stall was constructed and maintained so as to be reasonably safe for the purpose of stabling horses. On the contrary, Dickson, when asked, "You were of the opinion that the stable needed repair?" answered: "I never felt very safe, heavy horses being . . . continuously in there, you know, wearing the plank, knowing that there was an opening underneath."

In the recent case of Stewart v. Cobalt Curling and Skating Association, 19 O. L. R. 667, the defendants, the owners of a rink, were held liable in damages for negligence in respect of injuries sustained by the plaintiff, who paid for a seat in the rink to see a hockey match, and who was injured by reason of the breaking of the railing of the gallery in which he was seated, the railing not being so constructed as to resist the outward pressure of the spectators leaning for-

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ward to see what was going on below, which was to be expected and should have been guarded against. The defendants were not absolved because they had employed a competent architect. Chancellor Boyd refers in his judgment to Francis v. Cockrell, supra, and mentions that Sir Frederick Pollock (in Torts, 8th ed., p. 508) points out that the obligation resting upon the owner of a building to which the public is invited is different from the ordinary law of negligence. "The structure must be in a reasonably safe condition so far as the exercise of reasonable care and skill can make it so."

It is to be noted that Sir Frederick Pollock refers, at p. 508, to the rule as applicable to persons having control over buildings and other structures intended for human use and occupation. But the rule is not thus restricted, as he subsequently points out. "The possession of any structure to which human beings are intended to commit themselves or their property, animate or inanimate, entails this duty on the occupier or the controller:" p. 512.

In these grand-stand cases, the strain that should have been foreseen and provided against was, comparatively, a sudden one and confined to a brief period. In the present case the pressure was prolonged and continuous. But I see no reason why the rule, as above stated, should be varied merely because of this difference.

On the whole, therefore, I think the plaintiffs have established the liability of the defendants and are entitled to recover.

RICHARDS, J.A. (dissenting):—The plaintiffs were contractors for building a subway, and used a number of horses at that work.

The defendants owned a stable near where the subway was being built, and used it only for the purpose of stabling horses in transit on their railway. They are not livery, or boarding, stable keepers, in any sense.

The plaintiffs, finding, apparently, that there would be room for their horses in the defendants' said stable, arranged with them to use such portion of the stable as they needed for their horses. They also were allowed by the defendants to have a telephone in the building and to use an office, apparently without charge for the office. It was agreed that the plaintiffs should furnish the bedding for their own horses,

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and should bed them and do all the work of looking after them, including feeding them; but they were to be at liberty to use feed which the defendants had on hand for their own purposes. They were to pay for this 50 cents per day for each horse. Bills were rendered from time to time by the defendants to the plaintiffs for the 50 cents a day per horse, and in those bills it is charged as "stabling" the horses. The above, however, were the facts as to how the horses were handled and fed.

There is no evidence that any one remained in the building at night. The above arrangement began in May and went on until December. In December, a heavy horse, owned by the plaintiffs, while occupying a stall in the stable under the above arrangement, was injured by his foot going through the flooring of the stable. This floor was about three and a half feet above the ground. The horse was so injured from his leg going down through the break, and apparently from his struggles to extricate himself, that he died.

The plaintiffs brought this action in the County Court of Winnipeg, alleging that the defendants were boarding the horses for the plaintiffs, and that, owing to a defect in the flooring and to the negligence of the defendants in allowing the stable to remain in an unsafe condition, the flooring gave way and the horse fell through and died as a result. The action was tried before His Honour Judge Dawson, who nonsuited the plaintiffs. The plaintiffs then appealed to this Court.

The evidence is very vague in some respects in which it should be clear, and it is difficult to get at exactly what the facts were. No one was called on behalf of the plaintiffs to state what the original arrangement was. There seems to be no doubt that Mr. Dickson, the superintendent of the defendants' stock yards, who had supervision over the stable, was rather nervous about its condition. He says, however, that he informed Mr. Ewart Gunn fully as to the stable, but later he says that his recollection of having spoken to Mr. Gunn was not so very clear, but he knows that, when the horses were put in, he told the man who had charge of them for the plaintiffs about the condition of the stable, and that he was nervous about it, and asked him, if at any time he noticed any defect in the floor, to report it to him, so that he could have it repaired. He says that this man did so report to him at times, and that, in every such case, repairs were made.

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The man who had charge of the horses for the plaintiffs denies having reported the need of any repairs, or there having been any repairs required, while he was there. He does not, however, deny having been told by Mr. Dickson his opinion of the floor, or that Dickson asked him to report defects.

It is very difficult to find a precedent for such a case as this. The law referring to livery stables, innkeepers, and agisters cannot apply, it seems to me, because the horses were not in any way intrusted to the defendants, but remained entirely under the control and care of the plaintiffs, and there was, therefore, no bailment.

It is not exactly similar to a case of letting lodgings, because the evidence apparently does not shew that any definite portion of the stable was constantly used by the plaintiffs, or was set apart for their use.

The plaintiffs were apparently mere licensees. Whether they were licensees for hire or not, I find it difficult to understand; but it seems to me that the meaning of the evidence is that the 50 cents a day was a charge merely for the food eaten by the horses. I judge this from the fact that that is said to be what the railway company charged for feeding the horses which they stabled there while in transit. The fact that no charge was apparently made for the use of the office by the plaintiffs, I think, slightly corroborates this.

Perhaps the nearest position that one can think of to that which existed between the plaintiffs and the defendants, with regard to this stable, is that of a tenancy at will from day to day. If that were the position between them, I take it there would be no liability on the part of the defendants. But, assuming it to be that the plaintiffs were not tenants at will but were licensees, whether for hire or not, the fact is, that they occupied parts of this stable daily for some seven months, with differing numbers of horses, and I think they had ample time to see for themselves the condition of the stable. Then, too, there is the uncontradicted evidence of Dickson that he warned the man in charge to be careful and report to him if any repairs were needed. It seems to me that a man so put in charge by the plaintiffs was their agent to receive notice of matters affecting the stable. There is no evidence, too, that the plaintiffs themselves did not know its condition. I cannot but think that, before the accident occurred, they knew it and took all risks. If so, it seems to me

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immaterial whether they were, as to the use of the stable, licensees for hire or bare licensees. There is no evidence that the place where the horse's leg went through, was, before the accident, known to either party to be weak, or that there was any reason, known to the defendants and not to the plaintiffs, to suspect that it was dangerous.

The limit of liability in such a case seems to me not greater than that stated by Mr. Justice Harlan in Bennett v. Railroad Co., 102 U. S. at p. 580, where he says: "The owner or occupier of land who by invitation, express or implied, induces or leads others to come upon his premises for any lawful purpose, is liable in damage to such persons—they using due care—for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them."

If that is the limit, then there is no liability here, if I am right in the view that the plaintiffs should be held, on the evidence, to have known before December the condition of the stable.

In my opinion, the learned trial Judge was right in his finding.

I would dismiss the appeal with costs.

*Appeal allowed*; RICHARDS, J.A., *dissenting*...

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## MANITOBA.

ROBSON, J. FEBRUARY 14TH, 1912.

CHAMBERS.

### RE PHILLIPPS AND WHITLA, SOLICITORS.

*Solicitor—Taxation of Bill of Costs at Instance of Client—Appeal from Taxation—Questions of Principle Involved—Objections not Carried in before Taxing Officer—Right of Appeal—Rules 682, 684, 968, 969—Practice.*

Under a præcipe order obtained by the client under Rule 967, the solicitors' bill was taxed, and a formal certificate was signed by the Taxing Master. The client appealed from the certificate, but had not carried in objections before the Taxing Master:—

*Held*, that Rules 968 and 969 of the King's Bench Rules apply to solicitor and client taxations, but that the appeal from the certifi-

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**cate is under Rule 682, instead of under Rule 684; and the two first-mentioned Rules apply only when the appeal is as to items, and not where the principle of taxation is involved; and, therefore, as in this case two questions of principle were involved, viz., whether the remuneration of a solicitor on a percentage basis for the work of litigation is authorised, and whether the measure applied was a proper one, the appeal was competent, although Rules 968 and 969 had not been complied with by carrying in objections before the certificate was issued.**

**Consideration of the practice and review of the authorities.**

Appeal by the client from the certificate of a Taxing Master upon taxation of the solicitors' bill of costs against the client.

G. W. Jameson, for the client.

A. B. Hudson, for the solicitors.

ROBSON, J.:—The solicitors rendered to their client John McGibbon a bill of costs of certain litigation and the settlement resulting therefrom. The client obtained a præcipe order for taxation, under Rule 967. The taxation proceeded and resulted in the allowance of a large sum to the solicitors. A formal certificate was signed by the Taxing Master, and is with the papers in the matter. The client is dissatisfied and now seeks to appeal. No objections were carried in before the Taxing Master; and there was, therefore, no review of the taxation under Rules 968 and 969.

The solicitors raise the preliminary objection to the appeal that, owing to the omission to observe these Rules, there can be no appeal.

By clause (d) of Rule 965 it is declared that the amount certified to be due shall, forthwith after confirmation of the certificate by filing, as in the case of a Master's report, be paid by the party liable to pay such amount.

Our Rules in this connection were modelled after the Ontario Rules of 1888. In Re Robinson, 17 P. R. 137, the question was discussed in the Ontario Court of Appeal. Burton and Maclennan, JJ.A., thought the carrying in of objections and review thereon prior to certificate a pre-requisite to the appeal. Osler, J.A., thought otherwise. Hagarty, C.J.O., reached the same result as Osler, J.A., but on different grounds. There was thus no decision. The previous practice had been to treat such a matter as a reference, as it in fact is, and to apply the Rules for an appeal from a Master's report; and this practice was adhered to notwithstanding anything said in Re Robinson. See Re Mowat, 17

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P. R. 180. The Ontario Rules were subsequently amended so as to establish this latter practice: see Rule 773. Applying the Ontario cases prior to this amendment, the present objection would have to be disregarded. The subject was important there in an additional feature, i.e., as to the forum for the appeal, appeals from taxations ordinarily going to Chambers, while appeals from Masters' reports went to a Court. Here all such appeals are taken to a Judge in Chambers. Before applying the practice in Ontario under the Rules as they existed at the time of the cases above mentioned, and which resembled our present Rules, it is necessary to look below the mere surface.

From in Re Robinson and earlier cases, it appears that in the Court of Chancery a Master's certificate of taxation between solicitor and client was treated as a report and appealable as such, there being no such practice as review upon objections before certificate. Under the Rules of the Judicature Act, 1881, the taxation of a solicitor and client bill was reviewed in the same way as the taxation of a bill between party and party. In 1887 clause (d), being in the same language as clause (d) of our Rule 965, was introduced. See per Osler, J.A., in Re Robinson, 17 P. R. at pp. 147-148. That learned Judge held (p. 149), that the effect of this was to withdraw a report or certificate on a solicitor and client taxtion from the operation of the Rule as to other taxations, and to revert to the earlier practice. A perusal of the Ontario cases shews that that intention was carried out in practice there. With us the situation is different, as clause (d) was in the original of Rule 965, and Rules 968 and 969 were enacted contemporaneously with it. (See the Queen's Bench Act, 1895, Rules 958, 961, 962.) In short, clause (d) was not inserted with the intention of changing a practice.

The general language of Rules 968 and 969 is wide enough to apply to the reference of a solicitor's bill for taxation. The carrying in of objections and review prior to certificate may be had on the reference of a solicitor's bill quite as readily as in the case of a party and party taxation.

Clause (d) still has its effect, which is, that the appeal is to be treated as from a Master's report, and is to be taken in the method and within the time mentioned in our Rule 682 rather than in those prescribed in Rules 684 and 685.

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I would hold that Rules 968 and 969 of the King's Bench Rules apply to solicitor and client taxations, but that the appeal from the certificate is under Rule 682, instead of under Rule 684. Except as to time this may make little practical difference. Osler, J.A., in Re Robinson thought the different method of appeal in solicitor and client cases was instituted advisedly. Maclennan, J.A., thought this was an anomaly. As was said by Mr. Justice Osler (p. 149 of the report), the questions which arise in the case of solicitor and client references are frequently of a larger and more important nature than in the case of party and party taxations.

The similar Rules have, both in England and Ontario, been held not to apply where the principle of taxation was involved, but merely upon a taxation of items only. See Sparrow v. Hill, 7 Q. B. D. 362; In re Fletcher & Dyson, [1903] 2 Ch. 688; Re Robinson, 17 P. R. at p. 148; Clark v. Virgo, 17 P. R. 260.

In the present case, the bill consists of one large item for solicitors' work and a number of small items of disbursements. It is said that the solicitors forwent the items usually found in a solicitor's bill for litigious work and sought a lump fee, termed "Fee on Settlement." The amount allowed was based on a percentage of the value said to have been recovered or preserved for the client. It seems to me that there is a double question of principle involved here, viz., whether the remuneration of a solicitor on a percentage basis for the work of litigation is authorised, and whether the measure applied in this instance was a proper one. I, of course, express no opinion on these questions; but it is clear to me that they arise, and that I must hold that questions of principle were involved in this reference.

I must decline to give effect to the preliminary objection.

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## MANITOBA.

FEBRUARY 12TH, 1912.

COURT OF APPEAL.

## HUGGARD v. BENNETTO.

*Gift—Husband and Wife—Gift of Chattel—Absence of Actual Delivery or Present Words of Gift—Seizure of Chattel under Execution against Husband—Claim by Wife.*

In order to transfer a chattel by a verbal gift only, there must be an actual delivery of the thing to the donee. If manual delivery is not feasible, words of present gift, accompanied by a change of possession, may constitute delivery.

Where a wife claims a chattel as a gift from her husband, the delivery of the article as a gift must be clearly proved.

Where a motor-vehicle was purchased by a man and registered in his own name, but claimed by his wife, when seized under an execution against his goods, as a gift from him, and there was no evidence of an actual delivery or words of gift, an interpleader issue was decided in favour of the execution creditor.

*Cochrane* v. *Moore*, 25 Q. B. D. 57, followed.

*Kilpin* v. *Ratley*, [1892] 1 Q. B. 583, and *Tellier* v. *Dujardin*, 16 Man. L. R. 423, distinguished.

Judgment of PRENDERGAST, J., reversed.

Interpleader issue. The defendant had obtained judgment and issued execution against J. T. Huggard, under which the Sheriff seized an automobile which was claimed by his wife, the plaintiff in the issue.

The issue was tried before PRENDERGAST, J., who gave judgment in favour of the plaintiff.

The defendant appealed.

The appeal was heard by RICHARDS, PERDUE, and CAMERON, JJ.A.

C. P. Fullerton, K.C., and J. P. Foley, for the defendant.

M. G. Macneil, for the plaintiff.

The judgment of the Court was delivered by

PERDUE, J.A.:—The plaintiff's alleged ownership of the property seized rests wholly upon a verbal gift of it, which she asserts was made by her husband to her. The automobile was bought by J. T. Huggard with his own money. There



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was no bill of sale or other writing evidencing a transfer of it to the plaintiff.

In order to transfer a chattel by a verbal gift only, there must be an actual delivery of the thing to the donee: Cochrane v. Moore, 25 Q. B. D. 57, approving Irons v. Smallpiece, 2 B. & Ald. 551; Hardy v. Atkinson, 18 Man. L. R. 351; Re Bolin, 136 N. Y. 180. If manual delivery is not feasible, words of present gift, accompanied by change of possession, might constitute delivery: Kilpin v. Ratley, [1892] 1 Q. B. 583.

In Ontario it was held by a Divisional Court in Thompson v. Doyle, 16 C. L. T. Occ. N. 286, that in an action where a wife claimed certain articles as a gift from her husband, the delivery of the articles as a donation should be clearly proved, and that the uncorroborated evidence of the donee was insufficient. Boyd, C., said: "If the facts proved were equally consistent with the idea that he intended to deliver so as to be her property, and with the idea that he intended to keep as his own property, then the wife failed to make out her case."

The evidence fails to shew anything in the nature of a delivery of the article in question by the husband to his wife. Regarding the evidence in the most favourable light, as supporting the plaintiff's contention, all that is proved is, that Mr. Huggard bought the machine because his wife had been ill and was not in a condition to walk, that he intended that she and the family should use it and intended to make a gift of it to her. After it had been purchased it was sent to a garage and kept there when not in use. It was registered in accordance with the provisions of the Motor Vehicles Act, Mr. Huggard being the registered owner. After it was purchased, the machine was used not only by the claimant but by her husband and the family. There is no pretence that at any time an actual delivery of the machine was made to the claimant, or that any words of gift were addressed by Mr. Huggard to his wife after he had bought the machine.

The cases of Tellier v. Dujardin, 16 Man. L. R. 423, and Kilpin v. Ratley, [1892] 1 Q. B. 583, referred to by the learned trial Judge, do not support the plaintiff's case. In each of those cases an actual gift was proved. In the first case the article in dispute, a piano, was proved to have been given to the claimant by her father as a birthday gift and to

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have been always treated as her property thereafter. In Kilpin v. Ratley the claimant's father, being present with her in a room where some of the furniture in question was, verbally gave her the furniture by words of present gift. He then left the house, leaving the claimant in the room and in possession of the furniture. In that case there were words of present gift and the donee was left in possession. This was held to take the place of a manual delivery. In the present case there were no words of present gift and no change of possession.

I think the plaintiff has failed to establish any property in the article in question. The appeal should be allowed with costs and verdict should be entered for the defendant in the issue.

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## BRITISH COLUMBIA.

LAMPMAN, Co.C.J. FEBRUARY 3RD, 1912.

COUNTY COURT OF VICTORIA.

## ROBINSON v. CORPORATION OF DISTRICT OF SAANICH AND AIKMAN.

*Money Had and Received—Sum Deposited with Respondents as Bail upon Appeal from Conviction—Right of Assignee of Appellant to Recover in Action after Appeal Allowed —Costs—Deduction—Pleading.*

In the circumstances set out below, the plaintiff was *held*, entitled in this action to recover from the defendants the sum of $1,000 deposited by D. with the defendants as "cash bail" upon an appeal by her to a County Court Judge from a magistrate's conviction, the appeal having been successful, the conviction having been quashed, and the claim for the money having been assigned to the plaintiff.

The defendants were not allowed to deduct the sum of $75 allowed to them against D. as costs of a motion for prohibition, the defendants not having counterclaimed nor pleaded tender nor paid any money into Court, and D. having also been allowed costs of the appeal, fixed at $75, against the defendants.

Action to recover from the defendants the sum of $1,000, in the circumstances set forth below.

M. B. Jackson, for the plaintiff.

Aikman, for the defendants the corporation.

Lowe, for the defendant Aikman.

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LAMPMAN, Co.C.J.:—On the 24th August, 1911, Estelle Durlin, alias Carroll, was convicted by the Police Magistrate for the City of Victoria for keeping a disorderly house, and sentenced to four months' imprisonment. She appealed to the County Court, and by her counsel, Mr. Robinson, applied for bail. Mr. Aikman appeared for the Corporation of Saanich. Mr. Robinson suggested cash bail; and, as Mr. Aikman made no objection—he assented to $1,000 as being sufficient—I fixed cash bail at $1,000. At that time, in some way not explained to me, or, if explained to me, not now recalled by me, the Saanich authorities then had in their possession about $250 belonging to Estelle Durlin; and, while still in my Chambers, Mr. Aikman figured out the balance required to make up the $1,000, and thereupon instructed the Saanich constable to let Estelle Durlin go free when the balance was paid to him by her.

Subsequently, when the appeal came on for hearing before me in the County Court, Mr. Aikman, for the prosecution. took objection to my hearing it, contending that, as I had granted cash bail, which is a form of bail not allowed by the statute, Estelle Durlin had lost her appeal. Just why an appellant should lose an appeal because of a mistake by me was not apparent, as I could not read the statute in that way; and, moreover, it seemed to me that Mr. Aikman had waived any right to raise such a contention, because of his assenting to cash bail, accepting the $1,000, and letting his prisoner go free.

The appeal came on again before me on the 27th October, being the day set by me for the hearing; the appellant, Estelle Durlin, and her counsel appeared, but the prosecution was not represented. I allowed the appeal, Mr. Robinson for the appellant informing me that he had just come from upstairs, where a prohibition motion was being argued before Mr. Justice Morrison; and that, on his informing Mr. Justice Morrison at eleven o'clock that the appeal was coming on at that hour, and that he was in a quandary as to what to do, His Lordship suggested or intimated to him that he should attend on the appeal. I fixed the costs of the appeal at $75. The order drawn up directed "that the money paid in as security for costs, viz., the sum of $1,000, be paid out to the appellant's solicitor, Hume B. Robinson." This was an error, as the money was never paid into Court, and the $1,000 was not deposited or paid as security for costs, but as bail money.

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The next day—28th October—I was served with a prohibition order made by Mr. Justice Morrison restraining me from hearing the appeal, which I had already heard and allowed. By the order, Estelle Durlin was ordered to pay the costs of the motion, fixed at $75.

On the 3rd November, Estelle Durlin assigned to Mr. Robinson the said sum of $1,000 paid by her as bail money, and notice of the assignment was served on the Saanich authorities and on Mr. Aikman, and on the 3rd November Messrs. Hanington and Jackson wrote to Mr. Aikman this letter:—

"Rex v. Durlin.

"We are instructed by Mr. Hume B. Robinson to demand from you payment of the sum of one thousand dollars deposit made in connection with appeal by Estelle Durlin, alias Carroll, from the Magistrate's Court to the County Court, and which $1,000 His Honour Judge Lampman has ordered to be paid over to Mr. Robinson.

"We understand that you have possession of this money, and we are instructed to request your immediate payment of the same over to us for Mr. Robinson, otherwise we are to issue a writ to-day."

The money was not paid, and Mr. Robinson now sues. The plaint sets out the prosecution in the Police Court, the conviction, and the appeal; and paragraphs 4 and 5 of the plaint are as follows:—

"4. In connection with such appeal, the said Estelle Durlin, alias Carroll, was required to deposit the sum of $1,000 as security for her appearing to prosecute the appeal, and the said sum of $1,000 was duly paid over by her, and was received by the said defendant Aikman, and the defendant Aikman still holds and retains the said sum of $1,000, either under his personal capacity or as solicitor for the defendant municipality.

"5. The said appeal duly came on for hearing and was thereupon allowed by His Honour P. S. Lampman, Judge of this Honourable Court, and by order allowing the appeal, it was ordered that the sum of $1,000, security for costs of appeal, should be paid out to the plaintiff herein, Hume B. Robinson, solicitor for the said appellant."

The defence consists of a general denial of the allegations in the claim; and that I had no jurisdiction to deal with the appeal is also pleaded. At the trial, the facts as alleged in

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the plaint, and as stated by me above, were proved; but the defendants claim to be embarrassed and confused as to what the plaintiff is really claiming from them, and they build up an argument around the inaccuracy in the order of the 27th October allowing the appeal, wherein the sum of $1,000 is spoken of as security for costs, whereas it was in reality bail money.

On the trial before me, Mr. Lowe appeared as counsel for Mr. Aikman, and Mr. Aikman appeared as counsel for the Corporation of Saanich; and, when paragraph 4 is read, I really cannot treat their embarrassment seriously. It is admitted that they received $1,000. What for? It was paid as bail; and I should think there could be no question that, when the condition of the payment is fulfilled, the money must be paid back to the rightful owner. The ordinary bail bond provides that it shall be void if the accused appears when required, and does not depart without leave. The same conditions attach to a cash deposit; and, when the appellant appeared before me on the day set for the hearing, she did all that she was required to do; and, when her appeal was allowed, the bail money should have been returned to her. But the defendants say that they are embarrassed and confused by the statements in the plaint, and are not sure what sum of $1,000 it is that the plaintiff desires to recover, although it is admitted that this is the only $1,000 that they are aware of having been received by them from Estelle Durlin in any such circumstances. It must be a very trying position for the Corporation of Saanich and their legal advisers. They are confused as to what to do with this $1,000, although they know it does not belong to them; they know they received it from Estelle Durlin; and they know or ought to know that she or her assignee should get it back; and, although the assignee has demanded it and sued for it, they are still uncertain as to what they should do with it.

If their plea that I had no jurisdiction is good, I cannot see that that helps them, as the circumstances under which they received it are the same. It was not a gift. By what process does it become their property? It would be a monstrous thing if they could not be made to disgorge.

An offer of payment of $925 was made (and not accepted), as the defendants claimed $75 as their costs of the prohibition order—as an offset against this is the $75 item of appeal costs; and, under the circumstances, I will leave

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this question of costs alone, as the defendants have not made any counterclaim, and have not pleaded tender or paid any money into Court. The plaintiff is entitled to judgment against the defendants for $1,000.

The name in the style of cause of one of the defendants should be changed from the Municipality of Saanich to the Corporation of the District of Saanich; but, as I do not think the defendants were misled, they are not entitled to any costs of the amendment. The District is generally known as the Municipality of Saanich, and on official documents the Clerk still styles himself "Clerk of the Municipality of Saanich," and uses the seal of Saanich Municipality.

It is only fair to the people of the old district of North Saanich to say that the defendant in this action is the district sometimes called South Saanich.

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## SUPREME COURT OF CANADA.

NOVEMBER 6TH, 1911.

## WEBSTER v. SNIDER.

*Vendor and Purchaser—Agreement to Convey Lands—Consideration—Price in Money—Breach of Contract—Recovery for "Money Had and Received"—Sale or Exchange—Damages.*

S. sold his interest in certain lands to W. for a consideration, fixed at $19,000, of which $16,000 was to be satisfied by the conveyance of other lands, alleged to be owned by W. W. then executed a written agreement purporting to sell these other to S., for the sum of $16,000, acknowledged then and there to have been received by the vendor; bound himself to convey them to the purchaser, with a clear title, within one year from the date of the agreement; and time was stated to be of the essence of the contract. Upon default by the vendor to convey the lands, according to the agreement, the plaintiff sued to recover the $16,000, as money had and received for which no consideration had been given. In his defence, W. contended that the consideration mentioned in the agreement was not actually in cash, but consisted merely of lands to be conveyed in exchange at a valuation fixed at that amount: and, consequently, that the plaintiff could recover only damages to be assessed according to the value of the lands which he had failed to convey:—

*Held*, that, in the absence of evidence of any special purpose as the basis of the agreement, the terms of the contract in writing governed the rights of the parties; that the consideration mentioned in the agreement should be regarded as a price paid in money; and, consequently, the plaintiff was entitled to the relief sought.

Judgment of the Court of Appeal for Manitoba in *Snider* v. *Webster*, 20 Man. L. R. 562, 18 W. L. R. 48, affirmed.

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Appeal from the judgment of the Court of Appeal for Manitoba, Snider v. Webster, 20 Man. L. R. 562, 18 W. L. R. 48, affirming the judgment of ROBSON, J., at the trial, 16 W. L. R. 397, by which the plaintiff's action was maintained with costs.

The appeal was heard by DAVIES, IDINGTON DUFF, ANGLIN, and BRODEUR, JJ.

A. C. Galt, K.C., for the appellant, the defendant in the action.

Hugh Phillipps, for the respondent, the plaintiff in the action.

IDINGTON. J.:—The appellant and the late R. R. Snider owned together a farm and equipment, and the latter sold his interest in their joint property to the former, for considerations fixed by the bargain at $19,000. Part of this price was liquidated by notes and otherwise, but the details do not concern this appeal. The balance of $16,000, it was agreed, might be satisfied by the conveyance of a section of land in Saskatchewan, which the appellant was bound by contract in writing to convey to the deceased.

This part of the transactions had between the said parties took the shape of an agreement (dated the 15th October, 1908), which, on its face, purports to witness the sale by the appellant to the deceased, as purchaser of the said Saskatchewan land, at and for the sum of $16,000 in gold or its equivalent to be paid to the vendor at Winnipeg, which sum the vendor acknowledged then and there to have received.

He bound himself to have the said land conveyed to the deceased within one year from the date of the agreement, so that he should have a clear title to the property within said one year from date.

It was expressly stipulated that time should in every respect be the essence of the agreement.

This latter provision, as well as the main purpose of the contract, was so far disregarded that the land was not conveyed as agreed when this suit was launched, on the 11th May, 1910.

The deceased had, in his lifetime, transferred to the respondent all his interest in the purchase-money for the sale of his interest to the appellant, and securities therefor,

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and, amongst others, his rights under the appellant's contract of sale of said Saskatchewan land.

The respondent sued to recover from the appellant the said sum of $16,000 and some other balance alleged to have become due on account of other dealings between the deceased and the appellant.

The latter claims have been so disposed of that we are not now concerned therewith.

The respondent recovered judgment for the said sum of $16,000 and interest.

Thereupon an appeal was taken by the present appellant to the Court of Appeal for Manitoba, and his appeal was dismissed with costs: 20 Man. L. R. 562, 18 W. L. R. 48.

In appealing here, he urges that, in fact, the entire dealings between him and the deceased, in truth, constituted one bargain, which was an exchange whereby the deceased agreed to transfer his interests in the farm and equipment first-mentioned to the appellant for the said Saskatchewan land and the notes, money, and other considerations which were to make up the balance.

He contends that on such a bargain for exchange all the respondent can recover by way of damages is the value of this land in Saskatchewan which has not been conveyed, and is all that the respondent has lost by the breach of contract now in question.

I do not think it is necessary to enter upon any inquiry here as to what the measure of damages might be in such a case of exchange, for I can find no sufficient evidence to support the appellant's contention. All that appears is a sort of halting statement in his discovery examination, put in evidence against him, wherein he describes, without shewing how, the transaction as an exchange.

I cannot set aside the written document which this contradicts. Its terms are clear and concise, as I have recited. And if I were to draw an inference from those terms and such of the facts as are put before us, I would be inclined to say that this bargain was independent of the other, and was an afterthought, though possibly immediately after the first agreement.

At all events it may well have been so, and, if not, it rested on the appellant to shew clearly and explicitly what is alleged by him.

If the agreement was of the nature he contends for, then it should have been made to appear in this now in question.

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I prefer to take the document as it is and the facts that are admitted as to what preceded its execution. Doing so, I see nothing in the appellant's contention as to damages.

He owes $16,000 and interest for the balance of the price he agreed to give to the deceased for what he got from him.

I see no reason to trouble ourselves with nice questions suggested as arising on the agreement by which the appellant bound himself to convey to the deceased the Saskatchewan land. Suffice it to say that the deceased never executed that document, or relinquished therefor what he was to get from the appellant; that the latter had a chance given to him to satisfy the balance thereof, but failed to do so, and has failed to shew any good reason why he should have further indulgence.

His conduct throughout seems inexplicable. His attempt to get a new trial has been met by the Court of Appeal, in its discretion, refusing him that indulgence. It is the settled jurisprudence of this Court not to interfere with such exercise of mere discretion, unless it involves some question of law or a clear denial of natural justice.

It is consoling to know that in this case, even if the appellant has at last left in his hands the clear title to the land, it lies in a country exhibiting meantime such remarkable rises in land values that, if his alleged dealing was a fair one, he cannot suffer.

I think this appeal must be dismissed with costs.

DAVIES and ANGLIN, JJ., agreed with IDINGTON, J.

DUFF, J.:—The transaction (it was agreed by the parties) was to be treated as a sale for cash. There is no evidence that this agreement was entered into for any special purpose which would prevent us treating it as governing all the rights of the parties, or, at all events, such rights as are in controversy in this action. That being so, the executed consideration must be regarded as money paid for which the consideration has wholly failed. The evidence discloses no equity which could properly be held to disentitle the plaintiff to relief.

BRODEUR, J.:—I agree that this appeal should be dismissed with costs.

*Appeal dismissed with costs.*

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## SUPREME COURT OF CANADA.

NOVEMBER 6TH, 1911.

## CITY OF WINNIPEG v. BROCK.

*Statutes—Construction—Municipal Corporation — Closing Streets—"Passage of By-law"—Coming into Force of By-law — Time for Appealing—3 & 4 Edw. VII. ch. 64 (Man.)—Winnipeg City Charter.*

A municipal by-law, for the diversion and closing of certain highways and the transfer of the land to a railway company, provided that it should "come into force and effect" on the execution of a supplementary agreement between the municipal corporation and a railway company "duly ratified by council;" it also determined the classes of persons and property entitled to compensation in consequence of being injuriously affected by the diversion and closing of the streets. The statute 3 & 4 Edw. VII. ch. 64, sec. 708, sub-sec. c (1), conferring these powers, gave persons dissatisfied with the determination the right to appeal to a Judge "within ten days after the passage of the by-law." Another by-law was subsequently enacted by which the first by-law was "ratified and confirmed and declared to be now in force." The defendants, who had been excluded from the class of persons to receive compensation, appealed to a Judge, under the section of the statute above referred to, within ten days after the enactment of the second by-law:—

*Held*, that the words "within ten days after the passage of the by-law" in the statute had reference to the date when the by-law affecting the streets and determining the classes entitled to compensation became effective: that the first by-law did not come into force and effect in such a manner as injuriously to affect the defendants until it was ratified and confirmed by the subsequent by-law; and, consequently, the defendants' appeal came within the time limited by the statute.

Judgment of the Court of Appeal for Manitoba, 20 Man. L. R. 669, 18 W. L. R. 28, affirmed.

Appeal by the plaintiffs from the judgment of the Court of Appeal for Manitoba, 20 Man. L. R. 669, 18 W. L. R. 28, reversing the decision of MATHERS, C.J., in the Court of King's Bench, 16 W. L. R. 45, by which an injunction had been granted restraining the defendants from proceeding to an arbitration, pursuant to the provisions of the Winnipeg city charter, to determine the amount of compensation in damages to which they might be entitled in consequence of the diversion and closing of certain highways by a municipal by-law.

The appeal was heard by FITZPATRICK, C.J.C., DAVIES, IDINGTON, DUFF, ANGLIN, and BRODEUR, JJ.

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Wallace Nesbitt, K.C., O. H. Clark, K.C., and Christopher C. Robinson, for the appellants.

J. A. M. Aikins, K.C., and C. P. Wilson, K.C., for the respondents.

FITZPATRICK, C.J.C.:—The question here is: Was by-law 4264 passed in September, 1907?

By "passed" I presume is meant that, at that date, the by-law was so complete in itself that it effected the purpose for which it was intended, although, possibly, it might not be brought into force until a later date.

The object in view was the closing of certain streets. Can it be said that within the four corners of the by-law, as it then stood, could be found anything necessary to close the streets the result of which would be injuriously to affect the plaintiffs' property, without any further step being taken except to bring the by-law into force? Distinguishing between that which is necessary to make a by-law complete and effective and that which is necessary to bring it into force, it seems to me that the first by-law was not complete and never became effective until the second by-law was passed confirming the supplemental agreement.

The argument for the appellants is, that, when the supplemental agreement was executed, it had retroactive effect. If the by-law was not complete, inasmuch as it did not effectively accomplish the purpose for which originally it had been made until the second agreement was executed —within what delay would an appeal lie? From the date of the by-law or the date of the supplementary agreement?

Until such a by-law effectively closing the street was passed, the respondents had no interest upon which they could found a judicial proceeding. They could not be affected by something that was not done.

The second by-law purports to close the street. Otherwise what is the meaning of this expression in the agreement of the 24th August, 1907? The words used are: "Now, therefore, in consideration of the premises and in consideration of the city passing a by-law closing up the streets and lanes referred to in its said agreement, dated the 20th day of October, 1906, the company hereby declares as follows," etc.

If the streets had been closed by the first by-law, why insert that provision in the supplemental agreement? On

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the whole, I agree with my brother Idington; and, for the reasons which he gives, I would dismiss this appeal.

DAVIES, J.:—The substantial question to be determined in this appeal is, whether a certain by-law of the City Council of Winnipeg, No. 4264, professing to ratify and confirm an agreement made between the city and the Canadian Northern Railway Company for (inter alia) the closing up of certain streets of the city and the construction by the company of a subway under one of the streets of the city, was "duly passed," within the meaning of sub-sec. c (3) of sec. 708 of the Winnipeg charter, on the day the by-law bears date, the 30th day of September, A.D. 1907, when it formally passed the council, or on the 20th day of July, 1908, when a second by-law was passed, No. 5050, ratifying and confirming by-law 4264.

If by-law No. 4264 was so duly passed on the day of its date, the 30th September, 1907, then, so far as the question is concerned, the defendants, respondents, were too late in appealing to Chief Justice Dubuc on the 28th July, 1908; and this appeal from the judgment of the Court of Appeal for Manitoba should be allowed.

If, on the contrary, the by-law No. 4264 was not duly passed, within the meaning of sub-sec. c (3), until the 20th July, 1908, when by-law 5050, ratifying and confirming the supplemental agreement and the original agreement as amended by the supplemental one, and also ratifying and confirming by-law 4264 and declaring it "to be now in force," was passed, then this appeal must be dismissed, and the action brought to have it declared that the order of Chief Justice Dubuc of the 8th October, 1908, adding the names of the defendants to the names of those determined by the by-law 4264 to have been injuriously affected by the exercise of the powers contained therein, was ultra vires, must be dismissed.

The original agreement made between the city and the railway company was entered into on the 20th October, 1906. The by-law 4264, as to the day of the legal passage of which the controversy is, sets forth the agreement of 1906 in full, and in its enacting part: (1) ratifies and confirms the agreement; (2) grants to the company the privileges of entering upon the streets and building a subway specified in clause 1 of the agreement; (3) stops and closes

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up those portions of public streets bounded as therein specified; (4) provides for the conveyance of the closed-up streets to the company; and (5) limits the persons who might be injuriously affected by the exercise of the powers contained in the by-law and in the said agreement and who were entitled to compensation for damages by reason thereof under the provisions of the Winnipeg charter to those having an interest in any part of "real estate fronting on that part of Pembina street occupied or opposite the subway and its approaches."

The defendants (respondents), not being within this class of persons, were, therefore, excluded from claiming damages for any injurious affection of their lands.

Then follows the clause on the construction of which the controversy centres:—

"6. This by-law shall come into force and effect on the execution of the supplementary agreement dated the 24th day of August, A.D. 1907, by the Canadian Northern Railway Company and the City of Winnipeg and duly ratified by council.

"Done and passed in council assembled this 30th day of September, A.D. 1907."

To complete the chronological statement of the important facts, I may here state that this supplemental agreement, dated the 24th August, 1907, was, at the date of the passing of by-law 4264, under consideration of and awaiting the decision of the company and the city. Beyond the fact that it materially changed, in one respect at least, the obligations of the company to the city with respect to the construction of the viaduct, it had no direct bearing upon the compensation to which the defendants, respondents, might be entitled.

The supplemental agreement having eventually been executed by the company and the city, the city council, on the 20th July, 1908, passed by-law 5050: (1) ratifying and confirming the supplemental agreement and also ratifying and confirming the first agreement of 20th October, 1906, as amended by this supplemental agreement; and further declaring "(2) that the by-law No. 4264 is hereby ratified and confirmed and declared to be now in force."

In my judgment, the by-law of the 30th September, 1907, No. 4264, cannot be said to have been "passed," within the meaning of the statute in that regard, as to persons it excluded from those entitled to compensation for injurious

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affection of their lands, until the 20th July, 1908, when by-law 5050 ratified and confirmed both the supplementary agreement and by-law 4264,. and declared the latter "to be now in force."

If by-law 4264 was clearly not in force until by-law 5050 so declared it, there would seem to me to be an end to the question. Formally and technically passed, it might have been; but, as so passed, it was without life or force and could not be said to authorise the injurious affection of any lands or of the vested rights of any one.

Clause 6 of the by-law made it clear that before it ever could have any efficacy or operation, the supplementary agreement of the 20th August, 1907, modifying the original one set out at length in the by-law, should not only be executed, alike by the company and the city officials, but that such by-law 4264 and the execution of the agreement supplementary by the city officials should be duly ratified by the council.

It does not seem to me that any application on the part of the defendants could have been successfully made to a Judge to have their names added to the class of persons declared to be injuriously affected by the by-law No. 4264, within the ten days following this formal passing through council. Such applicants would be at once met by sec. 6, declaring that such by-law was not in force and might not ever come into force, and that, as it stood, it did not and could not operate to affect any person injuriously. To do so required further action alike on the part of the company and the city—action which might never take place, but was essential to give life and vitality to the by-law.

The limit of time imposed upon parties who asserted that their properties were injuriously affected by the city by-law closing up streets, etc., and who desired to appeal from a determination excluding them from the class of persons entitled to compensation, was short—only ten days.

But, in my judgment, that limitation is applicable only to a by-law which only really affected, and which did or might in its operation injuriously affect, other lands than those declared in it to have been affected. It could not have application to the case of a by-law such as this, which not only was not in operation or effective when formally passed, but was expressly stated on its face not to have any effect

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until certain named contingencies occurred which might, as a fact, never occur.

Without expressing my opinion, therefore, upon the question whether or not the Chief Justice, in hearing the appeal of the defendants, respondents, was acting as Judge of the Court or as persona designata, I am of the opinion that the appeal should be dismissed.

DUFF, J., agreed with DAVIES, J.

IDINGTON, J.:—The appellant is a municipal corporation of which the powers that it enjoys are set forth in its amended charter, 3 & 4 Edw. VII. ch. 64.

One of the amendments therein relates to the power to close streets, and convey the same, or part thereof, to a railway company, and is, for our present purpose, fairly abbreviated as follows:—

(c) For diverting or closing up any roads, streets . . . or lanes . . . or any part or parts thereof . . . and for conveying the same or any part thereof to a railway company . . . or to any person . . . and a conveyance to a railway company or to any person, made in pursuance of such by-law, shall absolutely vest in the company or person the fee simple in the land intended to be or purporting to be conveyed by the city to the company or person, and for determining what persons or classes of persons (if any) are injuriously affected by the exercise of the powers contained in this sub-section, and are entitled to compensation for damages by reason thereof, and no other persons or classes of persons shall be so entitled unless such determination shall be amended, on appeal to a Judge of the Court of King's Bench as hereinafter provided, and any advantage which the real estate, trade or business of any person may derive from the exercise of such powers . . shall be deducted from such compensation and the amount of any claim for compensation by any person entitled, as above provided, which shall include any damage to trade or business, shall, if not mutually agreed upon, be determined by arbitration under this Act.

(c1) If any person be dissatisfied with the determination as to persons, or classes of persons, injuriously affected, as above mentioned, he may appeal therefrom to a Judge of the Court of King's Bench, in which case he shall, within ten days after the passage of the by-law, apply to a Judge sitting

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in Chambers and produce to the Judge a copy of the by-law and shew by affidavit that he is interested and such facts and circumstances as he claims entitle him to succeed upon such appeal. The Judge, after service upon the city of a summons to shew cause in such behalf, may change, add to or diminish the persons or classes of persons so determined by the by-law, or may dismiss such appeal, and, according to the result of such an appeal, may award costs for or against the city. The decision of such Judge shall be final and conclusive, and shall not be appealed from or moved against by any party.

The mayor, treasurer, and comptroller of the appellant, professedly acting on its behalf, executed an agreement dated the 20th October, 1906, which the vice-president and secretary of the Canadian Northern Railway Company also executed, apparently on behalf of the latter. This agreement recited that the said company had asked the city to close certain streets and lanes which the company required to be closed in order that it might establish principal workshops there, and that the company had agreed to construct a subway and overhead bridge according to terms and stipulations thereinafter stipulated. Thereby the city, in consideration of the premises, granted permission to the company to enter upon Pembina street (one of those to be closed) and thereon construct a subway sixty-six feet wide, and the company agreed to construct accordingly as specified, that the construction should be commenced in seven months from the date thereof and completed within sixteen months from the said date; but, if the company raised the grade of its road and yard, the city was to extend the term limited for completion for six months.

The agreement provided for a number of details, incidental to this project, which need not be referred to.

Then the company covenanted to establish upon the ground indicated, and forever there maintain, the principal buildings and workshops of its system between Lake Superior and the Rocky Mountains. The buildings were specified, and the work of construction was to begin forthwith and be completed in two years from said date. The company agreed to indemnify the city "from all actions, causes of actions, claims, damages and compensation to or in respect of all real estate (if any) injuriously affected by the construction of the subway and the overhead bridge, and the closing of



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said streets and lanes, including damages (if any) to trade or business carried on thereon by reason of or resulting from anything done thereunder, which the city might be obliged to pay."

But it was thereby declared and determined, pursuant to sub-sec. (c) of sec. 708 (being that above abbreviated), that no person or class of persons were injuriously affected by the exercise of the powers contained in said sub-section, in respect of the closing of said streets and lanes, or entitled to compensation for damages by reason thereof.

It was graciously stated, in the closing part of the sentence setting this forth, that nothing therein "contained should affect the rights conferred by said sub-section of appeal to a Judge of the Court of King's Bench."

The irony of this gracious concession becomes more apparent when we observe that there is, in the sub-section named, no such right of appeal conferred, but that right is conferred only by another sub-section not named in the entire agreement.

By what authority the appellant's mayor and other officers executed this, nowhere appears before us. And when questioned in argument here, and when it was pointed out from the Bench that the transaction of any such business by the appellant must be authorised by a by-law, as required by sec. 472 of the charter, it was only faintly suggested in answer that there probably existed a by-law of the appellant authorising and directing the agreement.

Let us for the moment presume there was such a by-law, in conformity with said sec. 472, which is as follows: "472. The jurisdiction of the council shall be confined to the city, except where authority beyond the same is expressly given; and the powers of the council shall be exercised by by-law when not otherwise authorised or provided for."

The declaration and determination set forth above, as in the agreement, must, by the very nature of the contract and of the by-law-power given, be presumed to have been duly and judicially reached and determined by such by-law.

The business was ended. The later steps and by-laws were useless. Are the questions now raised thereanent to be treated as academical? Why, when presumably determined by a by-law adopting the judgment set forth as above, did the city council not let it rest? How could they revise, as it will presently appear they did, the work so done? They, on

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the theory of a by-law authorising and directing the agreement with this declaration, were functus officio.

The appellant has failed to take any such position heretofore and can hardly hope to take it now in such a proceeding as this. Yet it is the true position, and answers any one choosing to refer to and rely upon the agreement and by-law No. 4264 (to be referred to presently) as anything but an offer. And hence the story I have related has a direct bearing on what has been argued before us, as will presently appear.

The said agreement further provided "that the city, in so far as it has authority, will duly stop and close up those streets and lanes," etc., etc., and convey them to the company. This, it is to be noted, is a something to be done in the future.

Time was to be deemed to be the essence of the agreement.

Again, the company binds itself thereby, as soon as it has commenced any of the works contemplated, promptly and diligently to carry on the work to completion.

By paragraph 12, near the close of the agreement, it was provided as follows: "Should the company fail or neglect to carry out the covenants or conditions or any of them in this agreement contained, then on such default on the part of the company the streets and lanes or parts of streets and lanes hereby contracted to be conveyed to the company shall revert to and be vested in the city, and the city is hereby authorised at the costs and expenses of the company to do all things necessary to restore said streets and lanes, or parts of streets and lanes, to the original condition before the execution of these presents."

There does not seem to have been anything more to be done by any one until the 24th day of August, A.D. 1907, when we find another agrement of that date purporting to be made between the city and the company. This recites an alleged error in the above-mentioned agreement, and that the company agreed to amend it and also to provide a permanent crossing to be used in case of necessity.

The suggested amendment was evidently important, and the new proposition perhaps much more so. Both were to be carried out by putting in the two clauses now appearing in this new agreement. And, following them, it was provided that this agreement should be read and construed as and part of the said agreement of the 20th October, 1906.

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The attestation clause indicates a complete execution, but it is frankly admitted that, at least, the company did not execute until some time in the summer of the following year.

Chief Justice Mathers, the trial Judge, states that it was not executed until the 20th July, 1908, and he says, in the next sentence, that on that day another by-law, No. 5050, upon which the respondents rest their claim, was passed. I infer that the date may have been stated by counsel before him, and that he was given the correct date.

On the 30th September, 1907, a by-law, No. 4264, had been read by the city council, in which the agreement of the 20th October, 1906, to which I have so fully referred, was set out in full, and the council therein proceeds to enact, first, that the agreement thereinbefore set out is ratified and confirmed; secondly, that the city grants the right and privilege in the first paragraph of the agreement so set out; and thirdly, "there is hereby stopped and closed up those portions of public streets and lanes contained within the areas bounded as follows,"—and then describes the land. The fourth section of the by-law enacts: "The city by deed, executed by its proper officers, shall convey to the Canadian Northern Railway Company the respective parcels of land occupied by the portions of streets and lanes hereinbefore described and directed to be closed up, any of which the city by said agreement agreed to convey to the company under paragraph 8, and to and at the time agreed upon."

Sections 5 and 6 are as follows:—

"5. It is hereby determined that persons who are or may be injuriously affected by the exercise of the powers contained in this by-law and in the said agreement, and who are entitled to compensation for damages by reason thereof under provisions of the Winnipeg charter, are all persons having any estate or interest to the extent of such estate or interest in real estate hereafter described, or any part thereof, that is to say, as follows:—

"Real estate fronting upon that part of Pembina street occupied or opposite the subway and its approaches.

"6. This by-law shall come into force and effect on the execution of the supplementary agreement dated the twenty-fourth day of August, A.D. 1907, by the Canadian Northern Railway Company and the City of Winnipeg and duly ratified by council."

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Let us observe that this sec. 5 is quite inconsistent with the adjudication set forth in the agreement presumably adopted by a missing by-law.

This by-law, it is now strongly contended, was passed on the day it bears date, within the meaning of the word "passage" in the amended charter, sub-sections (c) and (c1) relative to the by-laws thereunder, and must be held to mean, in law, that this inchoate and incongruous business was so ended then and there that the respondents were bound to have appealed to the Judge within ten days from the date of the said by-law.

Before considering that fully, I will continue the story. The deferred execution of the agreement having taken place on the 20th July, 1908, by-law No. 5050 was passed. Its enactments are as follows:—

"1. The supplemental agreement dated the twenty-fourth day of August, A.D. 1907, between the City of Winnipeg and the Canadian Northern Railway Company respecting the amendment to the agreement between the said parties dated the twentieth day of October, A.D. 1906, is hereby ratified and confirmed, and said agreement dated the twentieth day of October, A.D. 1906, is hereby ratified and confirmed as amended.

"2. By-law No. 4264 is hereby ratified and confirmed, and declared to be now in force."

Within ten days of the passage of this by-law, the respondents appealed, under the amendment firstly quoted above, to the then Chief Justice of the Court of King's Bench for Manitoba, who then issued a summons which was served on the appellant, and on its hearing the latter appeared as the order recites, and the learned Chief Justice made an order putting the respondents on the list of those entitled to have damages assessed.

It seems that no objection was specifically taken to the jurisdiction of the learned Chief Justice; but an argument was made that the time must be computed from the date of by-law No. 4264, and not from that of No. 5050.

The order made, curiously enough, refers to the former by-law, but not to the latter.

Nothing more was done until the 19th November, 1910, when notice was given by the respondents to the appellant, naming an arbitrator under the Act, to determine the damages owing the respondents.

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No explanation is given for the delay; but I assume that it probably was felt by the respondents that, until the works had been proceeded with, the injury might not be properly appreciated.

Thereupon the appellant moved for an injunction to restrain the respondents from proceeding.

The motion was, by consent, turned into one for judgment, and Chief Justice Mathers ordered as applied for. From that order an appeal was taken to the Court of Appeal, and the order reversed.

The appellant now seeks by this appeal to have the order restored. Is it not clear that the first agreement was in fact abandoned and the situation as if it had never existed? Is it not also clear that it had been broken and become impossible of execution?

The question raised is, whether the words "the passage of the by-law" are to be confined to the date of by-law No. 4264, or the date of by-law No. 5050, when the former first became effective, according to the conduct of the appellant and its very language in the latter by-law.

The appellant's claim is certainly remarkable and most unjust.

The language of by-law No. 4264 seems to indicate that that by-law was not to be passed or considered so until ratified by the council, as it was by the later by-law No. 5050.

It is urged that the language used in the former refers to a then ratification by the council of the amending agreement. It can only be reasonably claimed, at the most, that the language is so very ambiguous that the conduct of those using it may well be looked at as a guide to its meaning; and, if so, their appeal seems hopeless.

For nothing can be clearer than that the later by-law is that which the council of the appellant rested upon to give vitality to the whole business about which they were concerned.

Test the issue raised by the obvious legal position that by-law No. 4264 left the matter in.

It would have been most hopeless for the respondents to have acted on the assumption that by-law No. 4264 had been passed.

How could they have ventured to nominate an arbitrator to settle their damages? How could they have approached any Judge to ask him to name another, if the appellant's council had refrained from appointing; or a third, in case

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driven to resort to the provision in that behalf, to fill up the board of arbitrators? How could they appeal to any Judge, as the very sections first above quoted require and entitle, until they could present him a complete and valid by-law? It would have seemed as hopeless an attempt as ever was launched to have tried any of these things.

But, if the Court had taken such a view and constituted the board, how, it may be asked, could its award be enforced? What authority could the appellant's council have to levy and pay such damages? Yet these might all have been the realities produced if the respondents had promptly proceeded, in the autumn of 1907, as it is now urged was their legal duty, and got put on the list, and had an arbitration. Nor does the absurdity end there, if we look at the long history I have set forth. The appellant's mayor, and, if legally authorised, its council, also had determined in October, 1906, that no one was entitled to claim for injury; and a year later tentatively reversed this finding, whilst waiting for the railway company to decide whether to accept the new order or not.

The times named in the original agreement for the company to proceed had long since elapsed. Their contract, if such it was, had been broken, and the hypothetically closed streets had, as the agreement provided for, automatically reverted to the city, by virtue of the terms I have quoted.

The power of the city had become exhausted by the terms of the first agreement, if we assume that a by-law had been properly passed, to direct and authorise it.

The adoption, in by-law No. 4264, by the city, of this broken contract, is a most questionable proceeding. But, until the matters involved in the said contract had been rehabilitated by the mutual agreement thus alleged, by-law No. 4264 stood entirely as an offer.

The facts demonstrate, of necessity, that everybody concerned must concur in restoring the broken contract, or in recreating it in an amended form, and, if the old one was to be used, something had to be done by mutual consent to waive the breaches already apparent and the amendments submitted and insisted on acceded to.

I will not say that such a thing was impossible; but I do say that, in my opinion, it was quite impossible for one party thereto to do that which not only needed waiver, but an entire abrogation of the terms of the agreement then become absolutely impossible, when No. 4264 was read, and

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the farce gone through of calling it a by-law, which was to adopt an impossible contract.

The clear truth is, that nothing could be done, and everything attempted by by-law 4264 was a nullity, until the parties to the contract had mutually agreed. This stage, for reasons that do not appear on the surface, had never been reached.

No by-law could, under this statute, be held to be within the proper competence of the council until a railway and the city had mutually so agreed that the council could pass such a by-law as required to close the streets. Indeed, I think the by-law for the latter purpose could be properly passed only after such an arrangement was come to as could justify closure of streets. In default of a by-law to direct the first agreement, it was null; and, in my opinion, no such by-law can in law be presumed, though, for argument's sake, assumed above. And no proper foundation existed for by-law No. 4264 to rest on in the way of closing of streets.

It is entirely beside the question to point to cases where there may be a by-law properly passed dependent upon the happening of a named event or lapse of time.

The foundation for this appellant's council's power to pass a by-law closing streets as provided, had not been laid when this alleged by-law 4264 was read.

Its first effort, if ever carrying sparks of vitality, had proved abortive. Its second had no justification in law unless and until there had been reached a mutual agreement. It is quite obvious that there was not only a hitch in arriving at an agreement, but that it never was supposed by the council that there was anything to be hoped for until the company had yielded and acceded to the much more onerous terms than those originally proposed to them.

Suppose all those whom the council finally declared (contrary to their first declaration and determination) entitled to damages had proceeded and had them assessed between September, 1907, and July, 1908, I suspect they and the appellant's council would have realised the absurdity of the present contention.

However much the curative sec. 525, to which we are referred, may help over the vicious first step of adjudging as was done, and of which I say nothing save to note the gross impropriety of such a proceeding, it cannot help to render competent that which was entirely incompetent

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I may remark that we have no evidence of the proceedings have been taken to render the said curative section operative.

I have the gravest doubt as to the propriety of this whole proceeding. The question of jurisdiction was not properly raised, as it should have been, if doubted, and then been followed by an appeal, or prompt application for prohibition, or default that the question raised before the Judge when the time came for a Judge to nominate an arbitrator. As an application for an injunction, it raises a question of the discretion of the Court, in cases of application for injunction, wherein the imperative requirements of settled practice have not precluded such discretion; and, if discretion ever was to be exercised, it certainly does not appear on these facts a proper case for exercising it to perpetrate an injustice. Moreover, the restraining an arbitration which has, on the appellant's theory, no legal foundation, and can determine nothing, has been refused. See North London R. W. Co. v. Great Western R. W. Co., 11 Q. B. D. 3. As this feature of the case was not fully argued, I do no more than express my doubts.

I think the appeal should be dismissed with costs.

ANGLIN, J.:—In my opinion the phrase "the passage of the by-law" in sub-sec. c (1) of sec. 708 of the Winnipeg charter (3 & 4 Edw. VII. ch. 64 (Man.)) means a final enactment of the by-law by the municipal council such that no further action by it in the nature of confirmation or ratification is requisite in order to make the by-law operative or effective. Where a by-law provides that it shall come into force only upon its being subsequently ratified or confirmed by the council, "the passage of the by-law" is consummated only when such ratification or confirmation is had. The concluding clause of by-law 4264 of the plaintiff corporation is as follows:—

"6. This by-law shall come into force and effect on the execution of the supplementary agreement dated the twenty-fourth day of August, A.D. 1907, by the Canadian Northern Railway Company and the City of Winnipeg and duly ratified by council."

Although ungrammatical, however read, having regard to all the circumstances, including the subsequent action of the council in passing by-law 5050, this provision of by-law 4264 was, I think, intended to make the efficacy of that

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by-law for any purpose dependent entirely upon its subsequent ratification by the municipal council. This ratification was given by by-law 5050, and the time for the appeal provided for by clause c (1) of sec. 708 ran only from the date of the enactment of that by-law.

In this view of the case, it seems quite unnecessary to refer to the other matters presented in argument.

The appeal fails and should be dismissed with costs.

BRODEUR, J.:—I agree in the opinion stated by my brother Anglin.

*Appeal dismissed with costs.*

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## SUPREME COURT OF CANADA.

NOVEMBER 6TH, 1911.

## BRITISH COLUMBIA ELECTRIC R. W. CO. v. WILKINSON.

*Street Railways—Injury to and Death of Passenger—Negligence—Operation of Railway—Defective System—Common Carriers—Gratuitous Passenger—Free Pass—Limitation of Liability — Fellow-servant—Evidence — Onus of Proof.*

The plaintiff's husband was an employee engaged as a mechanic in the company's workshops, and was travelling thither to his work on one of the company's passenger cars, as a passenger, without payment of fare. A freight car became detached from a train, some distance ahead of the passenger car and proceeding in the same direction; it ran backwards down a grade, collided with the passenger car, and the plaintiff's husband was killed. The manner in which the freight car became detached was not shewn. On the body of the deceased there was found a permit or "pass," which was not produced, and there was no evidence to shew any conditions in it, nor over what portion of the company's lines nor for what purposes it was to be honoured. On the close of the plaintiff's case, the defendants adduced no evidence whatever, and the jury found that the company were at fault, owing to a defective system of operation of their trains, and assessed damages, at common law, for which judgment was entered for the plaintiff:—

*Held*, that there was a presumption that the deceased was lawfully on the passenger car; and, in the exercise of their business as common carriers of passengers, the company were, therefore, obliged to use a high degree of care in order to avoid injury being caused to him through negligence; that there was nothing in the evidence to shew that the deceased occupied the position of a fellow-servant with the employees engaged in the operation of the trains which were in collision: and that, in the absence of evidence shewing any agreement,

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**express or implied, or some relationship between the company and the deceased which would exclude or limit liability, the plaintiff was entitled to recover damages at common law.**

***Nightingale* v. *Union Colliery Co.*, 35 S. C. R. 65, distinguished.**

**Judgment of the Court of Appeal for British Columbia, *Wilkinson* v. *British Columbia Electric R. W. Co.*, 16 B. C. R. 113, 17 W. L. R. 482, affirmed.**

Appeal from the judgment of the Court of Appeal for British Columbia, Wilkinson v. British Columbia Electric R. W. Co., 16 B. C. R. 113, 17 W. L. R. 482, affirming the judgment at the trial by which the plaintiff's action was maintained with costs.

The action was brought by the plaintiff, the widow of Archer Samuel Wilkinson, deceased, on behalf of herself and of a minor child, for the recovery of $25,000 damages suffered through the death of her said husband, caused, as alleged, by the negligence of the defendants. The circumstances in which the deceased met his death are stated in the head-note. On the verdict of the jury, judgment was entered for $8,000 damages awarded to the plaintiff, for herself, and $3,000 for her infant daughter. This judgment was affirmed by the judgment now appealed from, IRVING, J.A., dissenting.

The principal grounds urged on behalf of the appellants were: (1) that no evidence was supplied by the plaintiff as to the circumstances under which the deceased was upon the car of the company; (2) that there was sufficient evidence that the deceased was an employee of the company and was being carried to Westminster as such employee; (3) that there was some evidence that the deceased had a pass in his pocket when killed; (4) that the address of the plaintiff's counsel to the jury proceeded upon the assumption that the deceased was travelling upon a pass; (5) that, in his charge to the jury, the trial Judge pointed out that there was no evidence that the deceased "was in the position of an ordinary passenger under contract for carriage—there is no evidence of payment of fare, and there is evidence of the fact that he had in his pocket-book a pass;" (6) that there is no evidence whatever as to the cause of the accident; (7) that the onus was upon the plaintiff to prove all that was necessary to obtain a verdict, and that onus was not discharged.

The appeal was heard by FITZPATRICK, C.J.C., DAVIES, IDINGTON, DUFF, ANGLIN, and BRODEUR, JJ.

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J. S. Ewart, K.C., for the appellants, the defendants.

J. H. Chrysler, K.C., for the respondent, the plaintiff.

IDINGTON, J.:—The deceased husband of the respondent was a passenger on the appellant's railway car when, by reason of its servants' negligence, he met his death.

Prima facie, his widow, who sues as his personal representative, on behalf of herself and her children, is entitled to recover as any other, in like circumstances, might recover.

If there were any special circumstances to differentiate this case from that which the outstanding facts present, it devolved upon those claiming such exemption to have proven the facts to support it. Mr. Ewart's suggestion of there being a duty devolving on a plaintiff in such cases to negative or explain, is clearly unfounded. Who ever heard of such negative proof being tendered in such a case? It would require in each accident case that the passenger injured should prove that he never had a pass.

The bare statement that, after his death, the respondent found a pass in her deceased husband's clothes, without shewing for what or where, or that, by the terms of the pass or conditions upon which it issued, he assumed all risks, or even that he had presented it to the appellant's conductor on the occasion in question in answer to a demand for fare, goes for nothing.

Even a man travelling upon an unconditional pass cannot be killed with impunity by such gross negligence as apparent here on the part of those carrying the deceased.

It is suggested that he was a fellow-servant of those guilty of the negligence, and, hence, by reason of the doctrine of common employment, no recovery can be had at common law.

If so employed, there is no evidence that he was where he met his death by reason of that employment.

He was, for all we know, entitled to get by any means he chose to the place where he had to work for the appellant.

Until he entered on that employment and was actually engaged therein, how can he be said to have fallen within the principle of the doctrine of common employment?

That doctrine rests upon the implication that a person employed is presumed to have undertaken the risks incidental to such employment.

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This case is not brought within this fundamental reason for the doctrine; and, hence, it cannot apply.

There may arise questions of a nice character in this regard when, if ever, it is shewn, in such a case, that the terms of the contractual relation between employer and employee established that the employment began when the employee stepped into the employer's carriage.

I do not desire to express any opinion on such a case till it actually arises. I merely refer to a possibility which has not arisen here, but which the ingenuity of counsel suggested might be inferred by another jury.

I do not think that when, as here, the proof of anything tending to raise a mere suspicion was made by the appellant, and then the further relative facts peculiarly in its own hands are withheld or avoided with care, it can fairly ask any Court to exercise its discretion to prolong such litigation.

The appeal should be dismissed with costs.

DUFF, J.:—The deceased, Archer Samuel Wilkinson, met his death in a collision while travelling in one of the appellant company's passenger cars from Vancouver to New Westminster. The inference that the collision was due to the want of ordinary care on the part of the officers or servants of the company is indisputable. The company seeks to escape liability on the ground that the evidence fails to shew facts which enable us to say whether this absence of care involved any breach of duty for which the company is answerable to the respondent.

Wilkinson, who resided in Vancouver, was employed in the shops of the company at New Westminster, and was on his way thither on the morning when the accident occurred. It does not appear whether he did or did not pay his fare. It is suggested that he may have been carried gratuitously; and this suggested possibility is made the ground of the contention upon which the appeal was mainly based, viz., that, since we are ignorant of the character in which Wilkinson was on the appellant's car—whether, that is to say, as a passenger paying his fare, or as a passenger travelling free, or as a servant, being carried to his work—and, since we are equally ignorant of the character of the negligence out of which the collision arose—the plaintiff must fail, as we obviously cannot, in these circumstances, affirm either the existence of the gross negligence alleged to be necessary to

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attach liability to the company in the second case, nor the existence of negligence other than that of a fellow-servant which is necessary for success in the third.

This contention appears to me to be without substance.

I do not agree that in such an action as this it is necessary to prove that the traveller who has been killed had paid for his carriage or had entered into a contract to pay for it or that he was not being carried in the character of fellow-servant of those responsible for the accident. The appellant is a railway company carrying on the business of a common carrier of passengers. The obligation to take reasonable care to carry safely, arises out of the acceptance of the passengers.

The law, as settled, is stated in the passage quoted by Mr. Chrysler from the treatise on carriers in the "Laws of England," art. 80: "The duty of a railway company (speaking, of course, of a railway company when in the exercise of its trade of common carriers of passengers), to use a high degree of care towards its passengers does not depend on any contract with the passenger; it is bound not to injure by negligence any person lawfully on its railway, whether such person has made a contract with it or not."

Nightingale v. Union Colliery Co., 35 S. C. R. 65, cited by Mr. Ewart, is not a relevant decision. There the person injured was not being carried in a public conveyance by a railway company in the course of its business of common carrier of passengers. He was travelling on a locomotive attached to a freight train, and was there in violation of an express rule of the company. In the case before us, the presumption is, that Wilkinson was lawfully on the car, and the rule above stated applies unless something is shewn (some contract or relationship between the passenger and the company), which excludes or limits the application of it.

The doctrine of common employment or more accurately the doctrine of Priestly v. Fowler, 3 M. & W. 1, was invoked; but there is nothing in the evidence to justify the application of that doctrine. Wilkinson's work was in the shops; at the time he met with the accident, his day's work was not begun; and the risk of injury on the railway cannot, therefore, be regarded as a risk incidental to his service, unless it be shewn that he was being carried by the appellant not in the character of common carriers, but in that of employers—in other words, under some arrangement which was part of or ancil-

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lary to his contract of service. (See Goldbrick v. Partridge Jones & Co., [1910] A. C. 80, [1909] 1 K. B. 530, [1909] 2 Ir. 381.) Of this there was not the slightest legal evidence, and there was, consequently, on this head, no question which could properly be left to the jury. The sole point, therefore, upon which the jury had to pass was the amount of damages to be awarded; and, on that point, there is no adequate reason for disturbing their verdict.

FITZPATRICK, C.J.C., DAVIES, ANGLIN, and BRODEUR, JJ., agreed with DUFF, J.

*Appeal dismissed with costs.*

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## SUPREME COURT OF CANADA.

NOVEMBER 6TH, 1911.

### CITY OF VANCOUVER v. McPHALEN.

*Highway—Nonrepair of Sidewalk—Injury to Pedestrian—Municipal Corporation—Statutory Duty—Negligence—Nonfeasance—Civil Liability—Right of Action—Construction of Vancouver City Charter, 64 Vict. ch. 54, sec. 219.*

Where a municipal corporation is guilty of negligent default by nonfeasance of the statutory duty imposed upon it to keep its highways in good repair, and adequate means have been provided by statute for the purpose of enabling it to perform its obligations in that respect, *e.g.*, 64 Vict. ch. 54 (B.C.), persons suffering injuries, in consequence of such omission may maintain civil actions against the corporation to recover compensation in damages, although no such right of action has been expressly provided for by statute, unless something in the statute itself, or in the circumstances in which it was enacted, justifies the inference that no such right of action was to be conferred.

Judgment of the Court of Appeal for British Columbia, *McPhalen v. City of Vancouver*, 15 B. C. R. 367, 14 W. L. R. 424, affirmed.

*Per* FITZPATRICK, C.J.C., and DUFF, J.:—The common law obligation under which the inhabitants of parishes in England, through which highways passed, were responsible for their repair, has no application in the province of British Columbia.

Appeal from the judgment of the Court of Appeal for British Columbia, McPhalen v. City of Vancouver, 15 B. C. R. 367, 14 W. L. R. 424, which, on an equal division of opinion among the Judges, sustained the verdict entered at the trial in favour of the plaintiff.

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The appeal was heard by FITZPATRICK, C.J.C., DAVIES, IDINGTON, DUFF, and ANGLIN, JJ.

W. A. MacDonald, K.C., and Travers Lewis, K.C., for the appellants, the defendants in the action.

Lafleur, K.C., for the respondent, the plaintiff in the action.

DAVIES, J.:—The substantial question raised upon this appeal is as to the liability of the Municipality of Vancouver for nonfeasance in neglecting to repair a sidewalk in that city in consequence of which the respondent sustained injuries. The determination of that question must, of course, depend upon the construction of the charter of the city and the intention of the legislature, as evidenced in that charter as a whole, with regard to the duties and liabilities imposed upon the corporation. The statute or charter here in question, the Vancouver Incorporation Act, B. C. statutes of 1900, ch. 54, sec. 219, expressly imposes upon the city corporation the duty (inter alia) of keeping its highways in repair. It says: "Every such public street, road, square, land, bridge and highway shall be kept in repair by the corporation."

It is not contended by the appellant that for a neglect of this statutory duty, amounting to a nuisance, an indictment would not lie, but that a civil action by an injured person for damages has not been given and will not lie. As I understand the argument, it is, that, in the absence of clear and express language in the charter making the corporation liable in civil actions for special damages sustained by individuals in consequence of the corporation's breach of duty in failing to keep the streets in repair, no action will lie.

I am not able to accept that argument. I have examined all the leading cases and authorities cited by the appellant, and have reached the conclusion that express language creating civil liability for damages caused by the failure to perform a duty expressly imposed by statute upon a municipal corporation is not necessary. It is sufficient if a legislative intention to create such liability may fairly be inferred from the statute as a whole. If the duty imposed is one transferred from a body or authority on or with whom it previously rested, and which body or authority was not itself liable in civil actions for nonfeasance, then very clear, if not express, language would be required to be shewn in the statute imposing this additional liability upon the transferee corporation.

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In all cases it must, in the last resort, be a question of the intention of the legislature, to be gathered from the whole statute. If the duties imposed are discretionary or permissible merely, and not absolute, or, if absolute, adequate means are not given to carry them out, then very clear language must be used to found civil liability upon. But, where the duty imposed upon a corporation with respect to its streets and highways is absolute in its terms and is created and imposed in the charter calling the corporation into existence, accompanied with provisions giving the corporation ample powers to fulfill the duties imposed, and is not a duty merely transferred from a pre-existing authority or body, in itself not liable for civil damages for neglect of such duty, then it does seem to me that the Courts may fairly infer a legislative intention to make the corporation liable civilly for neglect of such duty.

Now, in the statute in question I find everything, in my opinion, necessary to justify the drawing of such an inference. The absolute duty to keep the streets in repair is imposed upon the corporation; provisions are inserted giving adequate means to enable the corporation to discharge its duty. The duty is one created by the statute, and not one transferred from any pre-existing body or authority, not in itself civilly liable for its neglect. The nature of the duty itself, affecting every inhabitant using the streets, is one which I cannot imagine the legislature intended should be neglected, with civil immunity from damages, by the corporation, and without remedy by one of the public specially damnified.

Unless, therefore, bound by the decided cases otherwise to determine, I would hold the corporation in this case liable. My colleagues Duff and Anglin, JJ., have, in their reasons for judgment, collated and reviewed all the more important cases bearing upon the point at issue, including that of Cowley v. Newmarket Local Board, [1892] A. C. 345, decided in the House of Lords, and those decided by the Privy Council of Municipality of Pictou v. Geldert, [1893] A. C. 524; Sanitary Commissioners of Gibraltar v. Orfila, 15 App. Cas. 411 (in 1890); and Bathurst v. McPherson, 2 App. Cas. 256 (in 1878); and have done it so fully and satisfactorily that I feel it quite unnecessary for me to go over the same ground.

Properly read, with reference to the facts with which the Courts were then dealing, these decisions will not be found



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at variance with the law as I have endeavoured to state it, though no doubt there are dicta of many distinguished Judges which apparently are so. Amongst these are observations of Chief Justice Strong in City of St. John v. Campbell, 26 S. C. R. 1, at p. 4. These, however, must be held to have reference to the particular facts relating to the charter of the city with which he was there dealing. That charter does not appear to have imposed any absolute duty upon the Municipality of St. John to keep the streets of the city in repair; and, in the absence of any such provision or of any language from which a liability for civil damages for misfeasance could be implied, the decision in that case cannot be held to be a binding authority, in such a case as we have now before us, where the duty to keep the streets in repair is expressly imposed upon the Municipality of Vancouver.

If, however, the controlling distinctions I have mentioned between duties permissive or discretionary and duty absolute, in the one hand, and between newly created duties with powers and authorities annexed to them sufficient for their discharge and duties transferred from pre-existing bodies or authorities not civilly liable for their neglect on the other, are kept in mind, it will serve to explain much that otherwise would seem conflicting, and perhaps justify the caution so frequently repeated of late years in the highest Courts that language used in delivering reasons for judgments, however broad, must be read and understood with reference only to the facts with which the Courts was then dealing.

I concur in dismissing the appeal.

IDINGTON, J.:—The appellant is a municipal corporation created by a charter which defines its powers and duties. Amongst such duties is enacted the following provision: "Every public street, road, square, lane, bridge and highway shall be kept in repair by the corporation."

The question is raised whether or not an action will lie against the corporation upon this enactment, at the suit of any one having suffered damages by reason of the non-observance of the duty thus imposed. It is well, therefore, in order to appreciate the scope of this legislation, to observe some other provisions in the charter. Section 125, sub-sec. 52, gives the corporation wide powers for "opening, making, preserving, improving, repairing, widening, altering, diverting, stopping up and putting down drains, sewers, water-

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courses, roads, streets, squares, alleys, lanes or other public communications within the jurisdiction of the council, and for entering upon, breaking up, taking or using," etc.

The corporation is empowered, by sub-sec. 48 of the same section, to remove all nuisances; by sub-sec. 77, to compel removal of snow and remove it; by sub-secs. 81 to 97, to regulate in every way the width, grade, mode of construction, and use of streets; and by sec. 185 it is empowered by prevent and abate public nuisances. Section 133 empowers, in a very wide way, the opening, extending, and widening of streets, etc. Section 134 empowers the construction of local improvements, including streets, by means of levying a local or frontage rate, and enacts that, when done, the work "shall thereafter be kept in a good and sufficient state of repair at the expense of the corporation."

The corporation is, by sec. 57, empowered to levy, for all the necessary expense of the city, up to one-and-one-third cents in the dollar, besides all rates for schools, interest, and sinking funds.

It is abundantly clear that, possessed of such very extensive powers which enable the corporation to limit the extent of streets to be constructed and nature of construction in such manner as to keep expenditure within its powers of taxation, there can be no excuse for nonrepair.

It is evident that the limit of taxation is such as to empower any necessary levy for such purposes. It is equally evident that no other body than the corporation has any power in the premises, and that no other power exists having authority to meddle with the subjects of construction or repair of the streets or highways.

There does not appear in the charter, so far as I can find, any penalty or special power given in any way to enforce this duty, imposed in such absolute terms upon the appellant.

By reason of defective construction or nonrepair, the sidewalk in question, built by the appellant two years previous to the accident, had become "wobbly," as one witness expressed it, for some time prior to the accident, though one of the street foremen or superintendents of the appellant had occasion to travel over it daily.

Two years only having expired since construction, I should be inclined to infer, without much hesitation, that it never had been properly constructed; and the jury may well have so concluded.

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It is contended, however, that it was the neglect of this duty to repair that constituted the issue tried in fact; and that, being a mere nonfeasance, no action would lie.

The usual great array of authority displayed in cases like this, distinguishing between nonfeasance and misfeasance, has been presented.

I cannot say that I can reconcile all these cases, or, indeed, that the mass of them deserve any attempt to do so. The first question raised is, whether or not, inasmuch as this statute gives no special remedy for the neglect of the duty it imposes, the respondent is one of the persons for whose benefit it was enacted; and next, if so, is he entitled to an action for damages resulting from the neglect of such duty?

Common sense would say there ought not to be any difficulty in such questions as are thus presented. But the development of our English law has proceeded in such a way that these questions are by no means free from difficulty. One is not surprised, therefore, to find the division of opinion in the Court below.

In Couch v. Street, 3 E. & B. 402, Lord Campbell said: "The general rule is, that 'where a man has a temporal loss or damage by the wrong of another, he may have an action on the case to be repaired in damages;' (Com. Dig., 'Action on the Case,' A). The Statute of Westminster II. (1 Stat. 13 Edw. I. ch. 50) gives a remedy by action on the case of all who are aggrieved by the neglect of any duty created by statute. See 2 Inst. 486. And in Com. Dig., 'Action upon Statute' (F), it is laid down that 'in every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage or for the recompense of a wrong done to him contrary to the said law.' L.C. 411."

One cannot help wishing that this statement of the law had remained unchallenged. But it has not, and the only guide now left seems to be that laid down by Lord Cairns in Atkinson v. Newcastle Waterworks Co., 2 Ex. D. at p. 448, adopted by the Court of Appeal in Groves v. Wimborne, [1898] 2 Q. B. 402. We must look, we are told, at "the general scope of the Act and the nature of the statutory duty." It may be said that this was merely spoken of the difficulties arising from there being in the statute a special remedy such as penalty or other like provision. I agree that

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is so. But I observe that is just the feature of the judgment in Couch v. Steel, 3 E. & B. 402, that was challenged, and it has been said such has been the challenge that it no longer stands as an authority.

I am not prepared to assent to that, in the sense that in every case or way the law was incorrectly laid down. I think no one can challenge the law as stated there, provided the statute to which it is applied is of the character that, applying Lord Cairns's rule or suggestions to it, one can found an action thereon.

But I go further and say that Lord Cairns's suggestions may well be applied to ascertain if we can found an action in a given case upon a given statute.

Now I, using such test, come back to the point of difficulty in the law as to this statute.

Can it be said that the persons it was to benefit are those who have to travel over the roads it binds the appellant to repair? I have come to the conclusion that they are—notwithstanding the innumerable dicta to which appeal may be made in a contrary sense. Although such a wealth of dicta exists, there is, I venture to say, no decided authority to the contrary construing such an imperative and direct statute as this freed from entanglement such as existed in those giving rise to the said dicta.

We have, moreover, the principle that must govern applied to the decision of analogous cases in such a way that I see no difficulty in the existence of such weighty dicta.

Before passing to the consideration of these cases, I must notice the argument for the appellant founded upon numerous English cases, decided upon a variety of English statutes, designed to secure due repair of highways.

I have referred to every one of the cases cited by counsel and numerous others, and, where analysed and the grounds of the reasons given traced, we find the history to be this, or nearly this.

Beginning with Russell v. The Men of Devon, 2 T. R. 667, we find the law to be, that no action would lie at common law against the inhabitants; not, as sometimes said, because unincorporated, but because the only remedy recognised by law was the indictment.

As surveyors of highways, or other like authority, were appointed, or corporations created in substitution for other parochial authority, they were one and all found not liable

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to be sued for damages, though they might have neglected the duty of repair more or less directly cast upon them by statute. But why so? Simply because the statute which imposed the duty of repair sometimes limited the resources given to pay for repair; sometimes permitted a discretion or exercise of some judgment, as limit of duty; sometimes merely gave the power without imposing the duty, sometimes expressly defined the limit of liability to be that of the inhabitants; and, when transferred to counties or other corporate bodies, had been defined to be that of their predecessors in duty; and, when traced out, their respective duties were bounded thus by the common law liability of the inhabitants.

Sometimes, as in the case of Maguire v. Liverpool Corporation, [1905] 1 K. B. 767, with that city's peculiar and diverse origins of corporate source of existence and responsibility—and the case of Cowley v. Newmarket Local Board, [1892] A. C. 345, by reason of the Public Health Act, 1875, having reached a state of development of municipal statute-law that appeared to bear more directly on the corporate authority and responsibility—the Courts were slightly troubled to reconcile the enactment of duties with this construction.

But I repeat that this and all such cases, however admittedly interesting and instructive as a study of the history of the law and its method of growing in England, are all beside the question raised here.

Of course, we find the adoption, as in the last-named case, of the rule I have referred to as that given by Lord Cairns, to consider the scope and purview of the statute.

The English cases, so far as bearing directly upon highways, being thus disposed of, we have Municipality of Pictou v. Geldert, [1893] A. C. 524, pressed on us as arising in this country. But it turns upon the same kind of history, with a difference in names, though identical in principle and result with these English cases. The Orfila case, 15 App. Cas. 411, is only another variation of the application of the same principles. Nor can I read Municipality of Sydney v. Bourke, [1895] A. C. 431, as at all helpful when I pay heed to the reasons given, founded upon a construction of a statute that leaves it very unlike this simple, yet comprehensive and imperative, statute before us, freed from what I, for want of a better expression, have called entanglements, so apparent

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in the other statutes (giving rise to like inquiries), and their history and expression.

Hartnall v. Ryde Commissioners, 4 B. & S. 361, is a very notable case. It gave the Courts a great deal of trouble to fritter it away. But that it seemed good law to Willes, J., in the case of Parsons v. Vestry of St. Matthew, Bethnal Green, L. R. 3 C. P. 60, where it was by him merely distinguished from others, by reason of the slight difference in the statute on which it rested, entitles it to respectful consideration.

Our statute is still more advanced, if I may say so, and I will cherish the belief that, if he had to interpret it, he would have no difficulty in reaching the conclusion that it can, without disastrous results, be so interpreted as it has been below.

I am more encouraged to this by finding that it was Blackburn, J., who with Crompton, J., constituted the Court that decided the Hartnall case, 4 B. & S. 361. It is on great authority, that of Blackburn, J., and the principle he laid down for the construction of such a statute in the case of Mersey Docks Trustees v. Gibbs, L. R. 1 H. L. 93, at p. 104, where he laid down the law to the effect "that in every case the liability of a body created by a statute must be determined upon a true interpretation of the statutes under which it is created," that the Chief Justice in the Court below proceeded, and in which Mr. Justice Galliher concurred.

In this rule, Lord Watson, speaking for the Judicial Committee of the Privy Council, in the case of Sanitary Commissioners of Gibraltar v. Orfila, 15 App. Cas. 411, concurred. That was a case arising out of an accidental falling of an overhanging road, for which it was contended that those in charge were liable.

We have thus, I say, Blackburn, J., whose rule of construction is thus adopted, holding with Crompton, J., the corporate body liable for damages arising from nonrepair, as a proper construction of a statute much less directly leading to liability than this one now in question; for there was in the statute in question an entirely different remedy given by way of indictment, and no right of civil action expressly given. We find that countenanced, as set forth above, by so great a lawyer as Willes, J.

In this case, the statute itself is not cumbered with any such statutory remedy as there, to raise doubts of the statute's

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meaning in this regard. We find in the Mersey Docks case, L. R. 1 H. L. 93, the House of Lords adopting and applying the rule laid down by Blackburn, J., when applied under a statute no wider and no narrower than this now in question.

Surely under such authority, and in the absence of express binding authority, the interpretation put upon this Act was correct.

I desire, however, to call attention to a case that, to my mind, is an express decision of the Court of Appeal in England, upon a similar statute relative to sewers, involving also, and only, the question of omission instead of commission. I refer to the case of Baron v. Portslade Urban Council, [1900] 2 Q. B. 588, upon sec. 19 of the Public Health Act, 1875, which reads as follows: "19. Every local authority shall cause the sewers belonging to them to be constructed, covered, ventilated, and kept so as not to be a nuisance or injurious to health, and to be properly cleansed and emptied." The action was brought because, by reason of this duty having been neglected, damages were suffered, and they were assessed at £75. The nonfeasance rule was invoked in argument, but ignored in the judgment, which was delivered by Lord Halsbury, concurred in by A. L. Smith and Vaughan Williams, L.JJ., and the appeal dismissed. It was also urged there that sec. 299 of that Act had furnished a remedy, and thus precluded the action from lying on the statute.

I submit that the principle upon which the appellate Court proceeded is applicable here, unless we can discover something in principle different in statutes dealing with highways from those dealing with sewers—or, I may add, docks—in founding an action by those compelled to suffer from omissions of duty relative to either one or the other, on occasions where the public body, bound to a duty by statute, have neglected their duty.

The sooner the distinction between nonfeasance and misfeasance, as applicable to actions on a statute of which the plain language indicates that it can be as grossly violated by an omission to do something as by doing a wrongful act forbidden by it, is discarded, the better. And I would do it without resorting to metaphysical subtleties which the ordinary mind cannot follow easily.

The distinction can and does find a proper field of operation in some statutes, but not in this class, so far as I can see.

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I have, out of respect to counsel, considered the St. John and Montreal cases decided by this Court, but must say there is nothing decided there binding us here.

I think the appeal should be dismissed with costs.

DUFF, J.:—The plaintiff, while walking on a sidewalk, constructed by the Corporation of the City of Vancouver on a public highway within the municipal boundaries, tripped over a loose plank and in consequence suffered serious personal injuries. It was left to the jury by the learned trial Judge to say whether or not the state of the highway was due to the negligent failure of the municipality to keep the sidewalk in repair, and whether the condition of the sidewalk was the cause of the injuries suffered by the plaintiff; and these questions they decided against the appellant.

The statute in which the corporate powers and duties of the Vancouver municipality (1900 B. C. ch. 54) are declared, imposes upon the municipality the duty of keeping highways in repair; and the controversy on this appeal turns upon the question whether this enactment confers a right to reparation upon an individual suffering a personal injury, in such circumstances as those giving rise to this action, or whether, on the other hand, the enactment is, as the appellant municipality contends, declarative of a right which is only capable of being vindicated in proceedings instituted in the public behalf.

It is not denied, of course, in form, that this is a question which must ultimately turn upon the view one takes concerning the intention of the legislation as ascertained from the statute. The controversy is rather as to the effect of certain decisions (and certain dicta of very eminent Judges) touching the responsibility of municipal corporations deriving their powers from other statutes passed by other legislatures in respect of negligent default in the matter of the repair of highways and as to the degree in which those decisions and dicta ought to be considered as regulating the construction of the special statute by which the appellant corporation is governed.

It is a general rule that where a duty rests upon an individual or a corporation of such a character that an indictment would lie for default in performing it, an action also will lie at the suit at a person who, by reason of such default, suffers some peculiar harm beyond the rest of

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His Majesty's subjects: Mayor of Lyme Regis v. Henley, 3 B. & Ad. at p. 93, 2 Cl. & F. 513, at p. 519; Sutton v. Johnston, 1 T. R. 493; Ferguson v. Earl of Kinnoull, 9 Cl. & F. at pp. 279, 283, 310; McKinnon v. Penson, 8 Ex. at p. 327; Hartnall v. Ryde Commissioners, 4 B. & S. at p. 367; Coe v. Wise, 5 B. & B. at p. 464; Maguire v. Liverpool Corporation, [1905] 1 K.B. at pp. 782 and 785. Where, nevertheless, the duty arises out of statute, the rule cannot be thus absolutely stated. The Statute of Westminster (1 Stat. W. 13 Edw. I. ch. 50) does indeed profess in terms to give a remedy by action on the case to all who are aggrieved by the neglect of any duty created by Act of Parliament. The effect of the statute, however, as stated in Comyn's Digest ("Action upon Statute" (F)) is that "in every case where a statute enacts or prohibits a thing for the benefit of a person he shall have a remedy upon the same statute for the thing enacted for his advantage or for the recompense of a wrong done to him contrary to the law." This, obviously, leaves it to be determined, in each case, whether the alleged duty has or has not been created "for the benefit" of the person aggrieved; which, of course (if the duty be a public duty), is only another way of stating the question whether the enactment does or does not evince an intention on the part of the legislature that a private remedy by action shall be available to a person suffering a special injury from the wrongful omission to observe its provisions.

There was at one time a disposition on the part of some very eminent Judges to hold that public bodies charged with duties to be performed by them as trustees on behalf of or for the benefit of the public, were not, in their trust or corporate character, answerable for the negligent acts or defaults of their servants; on the principle—which has been broadly applied in the United States in such cases—that such bodies, acting in the discharge of such duties, were agents or instrumentalities of government, and as such are not answerable for the torts of their servants. See the speech of Lord Wensleydale in Mersey Docks Trustees v. Gibbs, L. R. 1 H. L. 93, at pp. 124, 125; and Lord Cottenham's judgment in Duncan v. Findlater, 6 Cl. & F. 894. This view concerning the responsibility of municipal and other bodies for negligence or default in the performance of the public duties imposed by statute, was definitely rejected in a series of cases which culminated in the decision

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of the House of Lords in Mersey Docks Trustees v. Gibbs, L. R. 1 H. L. 93. There Lord Blackburn (then Blackburn, J.), delivering the unanimous opinion of the Judges, while adopting (p. 118) Lord Campbell's observation in Itchin Bridge Co. v. Southampton, 8 E. & B. 801, that "in every case the liability of a body created by statute must be determined upon a true interpretation of the statute under which it is created," stated the proper rule of construction to be that, "in the absence of something to shew a contrary intention, the legislature intends that the body, the creature of statute, shall have the same duties and its funds shall be rendered subject to the same liabilities as the general law would impose upon a private person doing the same things."

This canon of construction thus enunciated met with the approval of the House of Lords; and it is from the standpoint here indicated that, since the date of that decision, the Courts have examined claims preferred against municipal bodies created by modern statutes and based upon an alleged violation of duties said to arise out of the provisions of such statutes. The question in each case is, of course, as already mentioned, in the last resort a question of the intention of the legislature, to be collected from the enactment as a whole, interpreted in the light of such circumstances as may properly be considered, and according to the canons of construction properly applicable.

There are, however, I think, some well ascertained principles upon which the Courts have acted in such cases. It might be stated broadly, I think, with the support of the great weight of authority, that the breach (by way of omission or nonfeasance) by a municipal body of a legal duty created by statute, gives rise to an action at the suit of an aggrieved individual, where, (a) the default is of such a character as to be indictable, (b) the grievance suffered involves damages peculiar to the individual, (c) the damage suffered is within the mischief contemplated by the statute, and (d) where there is no specific provision excluding the remedy of action, and the provisions of the statute as a whole, taken by themselves or read in the light of the history of the legislation, do not justify an inference that the legislature intended to exclude that remedy. In other words, I think the effect of the actual decisions is, that, where there is a legal duty having attached to it the sanction of indictment which has been created by statute, and con-

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ditions (b) and (c) are present, then in general it rests with those who deny the remedy by action to point to something in the statute itself or in the circumstances in which it was passed indicating an intention to exclude the remedy. I think that is established by a series of decisions of high authority; but there are dicta of very eminent Judges (I shall be obliged to refer to them more particularly) which appear to conflict with this proposition, and it will be sufficient to take a narrower ground, which is quite broad enough for the purposes of this case, and is, I conceive, demonstrably conformable both to the authorities and to most of the dicta referred to. The ground upon which I think the liability of the corporation may be put consistently with every relevant decision and with almost if not quite all of the dicta I have seen, is this: where a municipal corporation, acting under powers conferred by the statute creating it, constructs a work for use of the public, and invites the public to use it, the corporation having the ownership and full authority to control the work, and to regulate the use of it by the public, and the statute creating the corporation in express terms imposes upon it the legal duty and at the same time gives it full authority to take all the necessary measures to prevent that work becoming a danger to the public making use of it, in the exercise of their right, and owing to the unreasonable neglect of the corporation to perform this duty the work does become a public nuisance, then, in order to resist successfully a claim for reparation by one of the public who has suffered a personal injury in consequence of the existence of the nuisance, (while properly using the work in the exercise of the public right) the corporation must shew something in the statute indicating an intention on the part of the legislature that the remedy by action shall not be available in such circumstances.

There is a large number of authorities in support of the proposition that, as a general rule, a municipal corporation is, apart from express enactment, under a legal obligation to make such arrangements as may be necessary to prevent the works which are under its care becoming a nuisance, and that, prima facie, persons suffering a special injury from the failure of the corporation to fulfill this obligation, have a right of action against them: Re Islington Market Bill, 3 Cl. & F. 513, at p. 519; White v. Hindley Local Board, L. R. 10 Q. B. 219; Blakemore v. Vestry of Mile End Old

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Town, 9 Q. B. D. 451; Corporation of Bathurst v. McPherson, 4 App. Cas. 256. We are, however, dealing with a case where the duty is created by express statutory enactment; and, as that relieves us from some of the difficulties which, in point of interpretation, have sometimes presented themselves, it will, perhaps, tend to simplify matters if we limit our intention to cases of a similar nature.

In Coe v. Wise, 5 B. & S. 440, and (Exchequer Chamber) L. R. 1 Q. B. 711, the Court of Queen's Bench and the Exchequer Chamber had to consider the responsibility of drainage commissioners who had Parliamentary authority to make a cut and sluice, and were required expressly by the statute from which they derived that authority to maintain the works when made. In the Court of Queen's Bench, Blackburn, J., dissenting, after quoting the section in which this duty was declared, said, at pp. 464 and 465: "Nothing has been pointed out in the argument, and I have not myself discovered anything to qualify this enactment, which certainly seems to me to cast upon the Drainage Commissioners the duty to maintain this sluice. The common law gives a right of action against those neglecting a duty cast upon them to those who, in consequence sustain damage. I entirely assent to the position that if the legislature have shewn an intention to prohibit this right of action in the present case that will effectually prevent it, and I agree that such an intention need not be shewn in express words, if it can be collected from the whole Act, but I think that the onus lies on the defendants to shew that it was intended to prevent the right of action, and not on the plaintiff to shew that it was intended to give it."

The majority of the Judges in the Court of Queen's Bench having taken the view that there was no right of action, their decision was reversed in the Exchequer Chamber, where it was held, following Mersey Docks Trustees v. Gibbs, L. R. 1 H. L. 97, 110, that the action lay; and in the judgment of the Court (Erle, C.J., Willes, J., and Channel and Pigott, BB.), after referring to that authority, it was said, at p. 720: "And we further hold that the action is maintained for the reasons stated by Blackburn, J., in this case in the Court below."

In Meek v. Whitechapel Board of Works, 2 F. & F. 144, Lord Penzance, then Wilde, B., held the defendants answerable in an action for a nuisance arising from their neglect

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of their statutory duty (secs. 68 and 69 of the Metropolis Local Management Act) to cause the sewers within their district to be kept clean.

In Baron v. Portslade Urban Council, [1900] 2 Q. B. 588, the Court of Appeal had to consider sec. 19 of the Public Health Act of 1875, which required the local authority in which sewers should be vested to maintain them so that they should "not be a nuisance and to see that they are properly cleaned and emptied" (p. 591). The council was held liable to an action at the suit of a person specially damnified by a nuisance arising from neglect of this duty.

In none of these cases was there anything in the enactment pointing to the intention to give a right of action beyond the provision creating the duty; and in each case reparation was awarded to a member of the public suffering special injury from a mischief which was one of the character the legislature intended to prevent, and which, of course, was attributable to neglect of the duty prescribed.

In Maguire v. Liverpool Corporation, [1905] 1 K. B. at p. 782, Vaughan Williams, L.J., said : "Are we to treat the liability which is imposed upon the corporation as a liability coming within the rule, where statutory duties are laid upon public bodies by statute, that in the case of any one suffering damage by reason of the neglect of such public body to perform the duties which are thrown upon it by the statute, an action will lie by the individual member of the public who sustains particular injury by reason of that neglect of duty?"

The appellant corporation does not dispute the authority of these decisions or controvert the reasoning of Lord Blackburn in Coe v. Wise, 5 B. & S. 440, at all events in so far as that reasoning applies generally to the responsibility of a public body for nonfeasance giving rise physically to such a state of things as constitutes an indictable nuisance. The contention upon which the appeal is founded, as I have already indicated, is this: that, according to the settled law of England, the duty of maintaining a highway in a state of repair, where it is cast upon a municipal body, is (as regards the legal sanctions attached to it) sui generis, and the fact that such a duty is imposed, expressly or impliedly, by an Act of Parliament does not ipso jure give a remedy by action for failure to perform that duty; and, moreover, is not in itself to be taken to indicate an intention on the part

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of the legislature that the remedy by action shall be available, and that such remedy is not available unless the legislature has in some other way clearly indicated an intention that it should be so. It is, of course, contended that no such intention can properly be implied from the provisions of the Act we have to consider. Before referring to the authorities upon which this contention rests, it will be convenient to note broadly the character of the powers conferred upon the Corporation of Vancouver touching the management and control of streets. The highways in the municipality are (sec. 217) vested in the corporation; and by the same section it is provided that these highways "shall not be interfered with" without the permission of the city engineer in writing. The council of the municipality, under sec. 125, has very full powers over highways and the public rights in respect of them. It may pass by-laws (sub-sec 52) for "opening, making, preserving, improving, repairing, widening, altering, diverting, stopping up . . . roads . . and other public communications." By sub-sec. 82, "to regulate the width of new streets and roads, and for preventing the laying out or construction of streets and lanes unless in conformity with existing streets, etc., without the consent of the council first obtained;" for regulating plans level with surface inclination and material of the pavement, roadway, sidewalks of streets, and roads (sub-sec. 83); for regulating roads, streets, bridges, and driving and riding thereon (sub-sec. 48); for dealing with nuisances, including "any structure or erection of any kind whatsoever . . . or any other matter or thing in or upon any . . . street or road."

And finally, by sec. 219, "Every . . . public street, road, square, bridge and highway shall be kept in repair by the corporation."

The decisions on which the appellants mainly rely are: Municipality of Pictou v. Geldert, [1893] A. C. 524, Municipality of Sydney v. Bourke, [1895] A. C. 431, and Sanitary Commissioners of Gibraltar v. Orfila, 15 App. Cas. 411, in the Privy Council; Cowley v. Newmarket Local Board, [1892] A. C. 345, in the House of Lords; and City of St. John v. Campbell, 26 S. C. R. 1, and City of Montreal v. Mulcair, 28 S. C. R. 458.

Of these decisions, the first in order of time is Cowley's case. That decision turned upon the effect of secs. 144 and

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149 of the Public Health Act, which declared that the urban authority should have and be subject to all the powers, duties, and liabilities of surveyors of highways, and should from time to time level, alter, and repair the highways as occasion should require. It was held that an action could not be maintained by a person who in passing along a highway was injured by reason of its dangerous condition due to the negligent default of the board to keep it in repair. The actual ground of the decision is thus stated by Lord Herschell (who took part in it), in delivering the judgment of the Privy Council in Municipality of Sydney v. Bourke, [1895] A. C. at pp. 443 and 444: "In a series of cases ending with Cowley v. Newmarket Local Board, in which it has been held that an action would lie for nonrepair of a highway, the duty to repair was unquestionable, and it was equally clear that those guilty of a breach of this duty rendered themselves liable to penal proceedings by indictment or otherwise; the only question in controversy was whether an action could be maintained. The ground upon which it was held that it could not—even where the duty of keeping the roads in repair had been in express terms imposed by statute on a corporate body—was, that it had long been settled that though a duty to repair rested on the inhabitants subjecting them to indictment in case of its breach, they could not be sued, and that there was nothing to shew that the legislature in transferring the duty to a corporate body had intended to change the nature or extent of their liability."

In Maguire v. Liverpool Corporation, [1905] 1 K. B. 767, in applying the decision in Cowley's case, Vaughan Williams, L.J., thus discusses it, at pp. 784 and 785: "That statutory obligation having been created, how is it that, by the decision in Cowley v. Newmarket Local Board, escape is made from the general proposition that where a statutory duty is created of such a nature that indictment would lie, or a remedy by criminal law be good for neglect to perform the statutory duty, an action will lie at the suit of a subject sustaining particular injury—I say, how is it that that undoubted general principle is escaped from in the decision in Cowley v. Newmarket Local Board? According to my understanding of the judgments, both of Lord Halsbury and Lord Herschell, it is really escaped from by going back to what is the liability which is thrown upon the

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inhabitants of the parish in respect of liability to repair roads, and the limitation of procedure for neglect to perform that duty to procedure by the Crown. I arrive at the conclusion that this Act of 1846 was really mainly passed for purposes of convenience of remedy, and convenience of performing the duties in respect of a large aggregate of houses and streets such as one finds in the case of the town of Liverpool. The object of the legislation merely being that sort of convenience, the object of the Act is that and that alone. It was not intended to alter the liability of those upon whom for convenience the carrying out of this work was thrown, but to leave it exactly as it was in cases where the obligation to repair was thrown upon the inhabitants of the parish."

At p. 787, he states the principle to be deduced from this and other cases following it, in these words: "I think that, having regard to the legislation that has taken place and to the various decisions which have been given, we ought, in construing this Act of Parliament, to start with a prima facie presumption that, in the transfer of the common law obligation to repair lying upon the inhabitants of the parish at large and on other bodies for the purpose of the public convenience, prima facie it must be assumed that the legislature did not by such a transfer intend to impose any greater duty or any greater obligation upon the persons or bodies to whom the obligation was transferred than that which would have existed before the transfer."

To the same effect is the judgment of Romer, L.J., at p. 790: "Furthermore, I think that certain other principles are now established with reference to the Acts of Parliament which create new bodies, with duties and obligations cast upon them to do the repairs of highways in lieu of the inhabitants of the parish. Modern authorities shew that the question whether in such cases the liability to an action for damages for nonrepair is thrown upon the new body created by the Act of Parliament such as I have mentioned, and such as those of 1830 and 1846 in the present case, is one to be gathered from the wording of the special Act. And it was pointed out in the case of Municipality of Pictou v. Geldert, [1893] A. C. 524, at p. 527, by Lord Hobhouse, who delivered the judgment of the Privy Council in that case, that 'it must now be taken as settled law that a transfer to a



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public corporation of the obligation to repair does not of itself render such corporation liable to an action in respect of mere nonfeasance. In order to establish such liability it must be shewn that the legislature has used language indicating an intention that this liability shall be imposed.' I need not go through these modern authorities in detail. I think the result of them, and in particular of the case of Cowley v. Newmarket Local Board, is accurately summed up by Mathew, J., as he then was, in the case of Saunders v. Holborn District Board of Works, [1895] 1 Q. B. at p. 98, where he says: 'The result of these decisions is plain—it is that in order to establish that a public body of this description is liable to an action for default in performing a duty imposed by statute it must be shewn that the legislature had used language indicating an intention that this liability shall be imposed, and unless such an intention on the part of the legislature is clearly disclosed, no action will lie.' As I have said, those observations appear to me to accurately sum up the authorities, treating the observations of Mathew, J., as being confined, as I think they were intended to be, to the question of the construction of such Acts of Parliament as those that I have been referring to."

It is obvious that the decision in Cowley's case and cognate cases is regarded by these learned Judges as creating an exception to the general rule, and it is quite plain that the Corporation of Vancouver cannot claim exception from the operation of that rule, upon any such grounds as those upon which these decisions are rested. Vancouver was incorporated in 1886 (49 Vict. ch. 32), and secs. 217 and 218 of the present Act are reproductions of secs. 213 and 214 of that Act. It is clear enough that at the passing of this Act the locality affected by it was not within the limits of an incorporated municipality, as the Chief Justice states in the Court below. Mr. Lewis directed our attention to the preamble of the Act; but I do not understand it to be suggested that the Town of Granville, there referred to, was an incorporated municipality. The inference from the form of the preamble itself would be that it was not; and, if there were any foundation for such a suggestion, it would unquestionably have been put forward in the Court below, and we should have been furnished with positive information on the point.

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There can, I think, be little doubt that the common law rule under which the inhabitants of parishes through which highways passed were responsible for their repair, was never introduced into British Columbia. By proclamation of Governor Douglas, on the 19th November, 1858, issued under the authority of an order in council of the 2nd February, 1858, passed pursuant to ch. 99 of 21 & 22 Vict., it was ordained that "the civil laws of England as the same existed" on the 19th November, 1858, "and so far as the same are not from local circumstances inapplicable to the Colony of British Columbia, are and will remain in full force in the colony till such time as they shall be altered," according to law. The local circumstances of the colony are pictured in the published correspondence between the Colonial Office and Governor Douglas in the years 1858 (the year in which the colony was established) to 1861, which correspondence has been a good deal considered in the last few years in the course of judicial proceedings in British Columbia. The colony owed its establishment to the influx of population due to the discovery of gold in the interior; and the correspondence makes it clear that one important duty of the detachment of engineers which was early sent out under the command of Colonel Moody was the construction of roads and trails. The Government—of necessity—assumed the maintenance of these highways. The same necessity (arising partly out of the physical character of the country and partly out of the fact that great stretches of uninhabited territory had to be traversed in passing from one settlement or centre of population to another), explains the fact that down to the present time the duty of constructing and maintaining roads and other highways outside the limits of municipalities has always been assumed and carried out by the Government of the colony or that of the province. The common law rule has never been acted upon, and was, in 1858, and still is, "from local circumstances inapplicable."

There is, therefore, no presumption arising from the state of affairs at the passing of the Act which can bring this case within the reasoning upon which the decision in Cowley v. Newmarket Local Board proceeded. Lord Herschell suggested in his judgment in that case that there was another ground upon which the decision might stand, and that suggestion, it is hardly necessary to say, requires the most careful consideration. I will return to it after dis-

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cussing the other decisions upon which the counsel for the corporation more particularly rely.

The next in order of date is Municipality of Pictou v. Geldert, [1893] A. C. 524. The statute under consideration in that case was the County Incorporation Act, a statute of the province of Nova Scotia, passed in 1879. Lord Hobhouse, in delivering the judgment of the Privy Council, points out, first, that the common law of Nova Scotia was the same as that of England in imposing upon the inhabitants the legal duty of maintaining highways, while not subjecting them to liability in an action for non-observance of that duty. Of the statute in question he observes (p. 529): "The first observation that occurs on these provisions of law is, that, under the Act of 1761, the liability to maintain road and bridges lay upon the inhabitants, and that this liability is preserved by the County Incorporation Act, which contemplates the enforcement of statute and highway labour. It is to be observed, further, that the statute does not in terms impose any obligation upon the municipality to repair the roads or bridges. It confers upon the council powers and authorities which extend to those objects; but the powers and authorities are conferred in precisely the same terms with reference to objects with regard to which the powers clearly must be discretionary and not matters of obligation." These observations, which seem to give the gist of the decision, have no application to the statute before us.

In Municipality of Sydney v. Bourke, the statute which the Privy Council had to examine contained no provision expressly imposing upon the municipal authority the duty to keep the highway in repair; and the effect of Lord Herschell's judgment is, that that authority was charged with no duty in respect of such repair which the Courts could take cognizance of. This is manifest from two paragraphs, on p. 439 of the report, which I quote:—

"Attention has already been directed to the fact that the provisions of sec. 82 of the 43 Vict., relating to the maintenance of highways, are empowering only, and do not purport to impose a duty. The terms of the section make it manifest that this was the intention of the legislature. The council have conferred on them in a single sentence power to alter, widen, divert, and improve public ways, as well as to 'maintain and order' them. It is obvious that the alteration, widening, diversion, or improvement are matters left abso-

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lutely to the discretion and judgment of the council, and that there is no binding obligation enforceable by law to do any of these things. It is impossible to hold that, whilst as to these matters a power only is conferred and no obligation imposed, the case is different as regards the maintenance of the highways.

"There is no doubt, in a certain sense, a duty incumbent on the council to see to the maintenance of the highways. It is for them to exercise the powers conferred upon them by law for the benefit of the community. In these matters they represent the citizens, and ought to have regard to their interests. For their discharge of these duties they are responsible to those whom they represent. The members of the council are the choice of the citizens, and if they do not use their powers well they can be displaced. But if they fail to maintain in good repair the highways of the city, it is not a matter of which the Courts can take cognizance, or which can be the foundation of an action if any citizen should be thereby aggrieved."

It is obvious that the reasoning of the Judicial Committee cannot be resorted to as governing the determination of the question before us.

Lastly, the ratio of the decision of the Privy Council in Sanitary Commissioners of Gibraltar v. Orfila, in so far as it affects the question under discussion, is stated, at pp. 412 and 413 of the report, in the following passage of Lord Watson's judgment: "The only duty laid upon them with respect to retaining walls is to maintain and repair them for the safety of passengers and ordinary traffic. And, lastly, it is expressly provided that, in executing the order, they must conform to any rules and regulations which the Governor may think fit to make. Their Lordships are, in that state of the facts, unable to resist the conclusion that the Government, in so far as regards the maintenance of retaining walls belonging to it, remains in reality the principal, the commissioners being merely a body through whom its administration may be conveniently carried on. They do not think that it was the intention of the Crown, in giving the sanitary body administrative powers subject to the control of the Governor, to impose upon it any liability, which did not exist before, in respect of original defects in the structure of the retaining wall which supported the Castle Road."

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It is not argued that the Corporation of Vancouver can escape on the ground thus stated; and it is plain that the actual decision cannot afford any support to the appellant's contention. Some stress is laid, however, upon Lord Watson's language at p. 411 in the following sentence: "But in the case of mere nonfeasance no claim for reparation will lie except at the instance of a person who can shew that the statute or ordinance under which they act imposed upon the commissioners a duty toward himself which they negligently failed to perform."

It is impossible to contend that by his language Lord Watson meant to convey that "the duty towards himself" must be declared in express words; the remainder of the passage, in which he quotes Lord Blackburn's canon in the Mersey Docks case as authoritative, shews that he intended to express no such idea. The passage means, I think, nothing more than this, that an intention to impute such a duty must be discoverable in the statute. I am not overlooking Mr. McDonald's reference to the passage in the judgment of Mathew, J., in Saunders v. Holborn District Board of Works, [1895] 1 Q. B. at p. 68. The observation in that passage must be taken, I think, to be confined as Romer, L.J., points out in Maguire v. Liverpool Corporation, [1905] 1 K. B. at p. 790, to Acts of Parliament such as those under discussion, viz., Acts which create new bodies with duties cast upon them to repair highways, in lieu of the inhabitants of the parish.

It remains to consider the observations of Lord Herschell in Cowley v. Newmarket Local Board, [1892] A. C. at p. 352, in which he suggests that the case falls within the scope of the remark of James, L.J., in Glossop v. Heston Local Board, 12 Ch. D. 102, 109. With the greatest possible respect for even a passing suggestion of Lord Herschell, I am constrained to think that there is no parallel between the statutory duty to provide a sufficient number of sewers for a given district, imposed by sec. 15 of the Public Health Act (which was the case to which the attention of James, L.J., was directed), and a statutory duty to keep a highway, or, if you like, an existing system of sewers, from becoming a nuisance. The first may to so great a degree rest in the discretion of the authority charged with it, that it would be difficult for a Court of law to take cognizance of it at all; and in fact, since the decision in Cowley v. New-

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market Local Board, it has been held that the sole remedy for non-performance of the duty imposed by the enactment in question was provided by the enactment itself, and was an appeal to the local Government Board. The difference between the two classes was pointed out by Kennedy, L.J., in Dawson v. Bingley, 27 Times L. R. 308, at p. 311; and earlier by Lord Halsbury in Baron v. Portslade Urban Council, [1900] 2 Q. B. at p. 590, in these words: "There seems to be a wide difference between the obligation or duty to construct a new system of drainage and the obligation on the local authority to use sewers that are vested in them in a proper and reasonable manner."

That observation appears to indicate the distinction between the case referred to by Lord Herschell and the present case.

The statute which this Court had before it in City of St. John v. Campbell, 26 S. C. R. 1, contained no provision expressly imposing any duty upon the municipality in respect of repair of highways; and, having regard to the passages already quoted from Lord Herschell's judgment in Muncipality of Sydney v. Bourke, it is doubtful whether any duty, the breach of which could be the subject of an indictment, could be held to be implied. A decision that such a statute does not give a right of action for a special injury arising from nonrepair, cannot, I think, properly be held to be conclusive of the interpretation to be placed upon a provision in another statute expressly imposing such a duty.

For these reasons, I think the appeal should fail.

FITZPATRICK, C.J.C., agreed that the appeal should be dismissed with costs, for the reasons stated by DUFF, J.

ANGLIN, J.:—The question which confronts us in this case is whether the Corporation of the City of Vancouver, which is required, by a mandatory provision of its statutory charter, to keep in repair highways within its limits, is or is not liable to pay damages at the suit of a person injured while lawfully using one of such highways, owing to its being in a state of disrepair.

Although there was some evidence upon which this case might have been presented as one of misfeasance—defective original construction—that aspect of it was not submitted to the jury by the learned trial Judge. No exception was

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taken to his charge on this or any other ground. In the provincial Court of Appeal the case was apparently treated by all the Judges as purely one of nonfeasance, two of them expressing the opinion that the question of misfeasance was not open to the plaintiff. Under these circumstances, the respondent should not be allowed now to invoke the ground of misfeasance in support of his judgment.

If it were necessary, in an action based on non-fulfilment of a statutory duty, to make out a case of actual or imputed notice of the existence of conditions amounting to a breach sufficient to sustain a charge of negligence, the judgment for the plaintiff could not, I think, be successfully attacked on the ground that evidence of facts warranting an inference of such notice is lacking.

The real question, however, presented for our determination is, whether the general rule that a person, for whose benefit as an individual, or as a member of a class, a statute is enacted, shall have a personal remedy for a breach of it which causes him injury (per Farwell and Kennedy, L.JJ., in Dawson v. Bingley Urban Board, 27 Times L. R. 308), has no application to statutes imposing duties on public bodies representing the public, or whether the application of this rule to these public bodies is excluded only where circumstances exist which shew that Parliament did not intend to impose upon them such a liability. The latter is, in my opinion, the correct view.

An analysis of the comparatively numerous English authorities of the class of which Cowley v. Newmarket Local Board, [1892] A. C. 345, is perhaps the leading example, makes it tolerably clear—notwithstanding some broader judicial statements, made inadvertently, which lend colour to the opposite view—that the real ground upon which many English municipal bodies charged by statutes with highway repair have been held not liable to travellers for injuries sustained by them in consequence of failure to discharge that duty, was that, in enacting the various statutes imposing the obligation of repairing highways on these municipal corporations, Parliament intended merely to transfer to them an existent duty which rested on the inhabitants, without changing the nature or the extent of the liability to be incurred upon the failure to discharge it: Municipality of Sydney v. Bourke, [1895] A. C. at pp. 433-444. A recent instance of exemption, on this ground, of an English

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municipal corporation from civil liability, is furnished by the English Court of Appeal in Maguire v. Liverpool Corporation, [1905] 1 K. B. 767. In many of the English cases, the statutes dealt with will, upon examination, be found to be merely empowering or permissive; and several of them have, for that reason, been held not to impose a duty on the corporation. By other statutes the character and extent of the repairs required to be made is left to the discretion of the municipal body.

In City of St. John v. Campbell, 26 S. C. R. 1, there appears not to have been any such statutory duty to repair as we have in this case. In no case that I have found, where the statute, either in express terms or by necessary implication, imposed on the municipal corporation an absolute duty to repair, has it been held not civilly liable, unless the duty could be propperly regarded as having been merely transferred to it, without change in its nature or incidents, from individuals or another body not subject to civil liability for its non-performance. Upon this ground, the application of the general rule above stated has frequently been excluded. No doubt, in certain statutes Parliament has otherwise indicated its intention that the imposition of a statutory duty shall not entail civil liability to a person injured in consequence of a breach of it. But, in the absence of some sufficient ground enabling the Court to say that the legislature intended to exempt the body upon which a statutory duty is imposed from civil liability to a person who is within the class for whose benefit such duty was created, and who has been injured by its non-fulfilment, the general rule should, in my opinion, be applied, and the injured person should be accorded his remedy in damages.

I find nothing in the statute now before us which suggests that the legislature did not intend that the present defendants should be civilly liable to any lawful traveller who may sustain injury on their highways owing to their having been negligently allowed to be in a state of disrepair. The duty to repair is created in mandatory and imperative language. There is nothing in the record to indicate that the duty thus imposed was transferred to the defendants from any other body—nothing to shew that there was any pre-existing common law obligation to repair lying upon the inhabitants of the territory incorporated as the City of

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Vancouver. The learned Chief Justice of the provincial Court of Appeal, speaking, no doubt, with full knowledge both of the local history of Vancouver and of the municipal legislation, both public and private, in British Columbia, says: "Before the incorporation of the defendant, the locality now included within its limits was not organised, nor was it within the limits of any organised district. The Act, therefore, did not transfer common law powers and liabilities from the inhabitants of a district to an incorporated body, but the powers granted and liabilities imposed were original." In this statement Mr. Justice Galliher concurs. The dissenting Judges do not question it. There being nothing in the record to cast the slightest doubt upon it, we should not be justified in assuming it to be inaccurate. The statutory duty of the defendants to repair highways should, therefore, be treated as "original and not transferred."

"In the absence of something to shew a contrary intention, the legislature intends that the body, the creature of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities, as the general law would impose on a private person doing the same thing": Mersey Docks Trustees v. Gibbs, L. R. 1 H. L. 97, 110; Sanitary Commissioners of Gibraltar v. Orfila, 15 App. Cas. 400, 412.

For these reasons, I am of the opinion that the defendants were rightly held liable, and that their appeal should be dismissed with costs.

*Appeal dismissed with costs.*

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## SUPREME COURT OF CANADA.

DECEMBER 6TH, 1911.

## CANADIAN PACIFIC R. W. CO. v. REGINA BOARD OF TRADE.

*Railway—Construction of Statutes—Railway Act, R. S. C. 1906 ch. 37, secs. 77, 315, 318 (2), 323—1 Edw. VII. ch. 53 (D.)—52 Vict. ch. 2 (M.)—53 Vict. ch. 17 (M.) —1 Edw. VII. ch. 39 (M.)—Board of Railway Commissioners — Complaints—Evidence — Agreement for Special Rates — Unjust Discrimination — Practice — Form of Order on Reference.*

In virtue of an agreement with the Government of Manitoba, validated by statutes of that province and of the Parliament of Canada, the Canadian Northern Railway Company established special rates for the carriage of freight, etc., to points in Manitoba, and the Canadian Pacific Railway Company reduced its rates, which had been in force prior to the agreement, in order to meet the competition resulting therefrom. The complaint made to the Board of Railway Commissioners for Canada by the respondents was, in effect, that, as similar proportionate rates were not provided in respect of freight, etc., to points west of the province of Manitoba, there was unjust discrimination operating to the prejudice of shippers, etc., to and from the western points. On questions submitted for the consideration of the Supreme Court of Canada:—

*Held*, that the facts mentioned are circumstances and conditions, within the meaning of the Railway Act to be considered by the Board of Railway Commissioners in determining the question of unjust discrimination in regard to both railways; that such facts and circumstances are not, in law, conclusive of the question of unjust discrimination, but the effect, if any, to be given to them is a question of fact to be considered and decided by the Board in its discretion.

*Cf. Montreal Park and Island R. W. Co. v. City of Montreal*, 43 S. C. R. 256.

Appeal, by leave of the Board, under sec. 56 (3) of the Railway Act, from an order of the Board of Railway Commissioners for Canada, dated the 10th December, 1910, by which the appellants, the Canadian Pacific Railway Company and the Canadian Northern Railway Company, were directed to publish and file new tariffs removing the discrimination declared to exist in the tariffs then in force to points in the provinces of Manitoba, Saskatchewan, and Alberta, from Fort William, Ont., Port Arthur, Ont., and points east thereof, in favour of Winnipeg, Man., and other points in the province of Manitoba, by reducing the rates from Fort

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William, Port Arthur, and points east thereof, to Regina and Moose Jaw, in Saskatchewan, and other points west of the said favoured points.

The order of the Board of Railway Commissioners, granting leave for the appeal was as follows:—

"It is ordered that the said railway companies be and each of them is hereby granted leave to appeal to the Supreme Court of Canada from the said order, dated the 10th December, 1910, upon the questions hereinafter stated, which, in the opinion of the Board, are questions of law, subject to and upon the terms and conditions following:—

"1. That the applicants undertake to set the appeal down for and expedite the hearing thereof at the next sittings of the Supreme Court of Canada.

"2. That, if the appeal be not argued at the said sittings of the Supreme Court, for any reason for which the applicants may be to blame, then the appeal shall not operate as a stay of the said order dated the 10th December, 1910, unless this Board shall otherwise order.

"3. That the questions for argument upon the said appeal arise out of the following facts:—

"1. (a) In the year 1888, an agreement was made between the Northern Pacific and Manitoba Railway Company and Her Majesty the Queen, represented by the Railway Commissioner for the Province of Manitoba, and was approved and ratified by the legislature of Manitoba by ch. 2 of the statutes passed during the second session of 1888. By that Act, the company was empowered to acquire and complete the Red River Valley Railway, located between the international boundary and the city of Winnipeg, and certain other branches and extensions, as therein set forth, and by the agreement, which is schedule A to the Act, among other things, the Lieutenant-Governor in Council of the said province agreed to aid the construction of the railway, by guaranteeing the bonds of the company to the extent of $6,400 per mile of railway, and by giving to the company certain other benefits and advantages, as set forth in the said agreement; and, in consideration of the benefits and advantages agreed to be granted to and conferred upon the company by the said agreement, it was agreed by the company that the Lieutenant-Governor in Council of the said province shall always have full power to fix, regulate, and determine, from time to time, the freight rates and

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charges for transportation upon the said lines of railway, as by reference to the said Act and agreement will more fully appear.

"(b) This agreement was modified by another agreement, made between the same parties in the following year, and approved by the legislature of the province of Manitoba, by ch. 17 of the statutes of 1899, as by reference to the said statute and agreement will more fully appear.

"By clause 8 of the amending agreement, it was provided that the power to regulate, fix, and determine rates, conferred upon the Lieutenant-Governor in Council, by sec. 19 of said schedule, for railways of the province of Manitoba, shall be limited so that the tolls, rates, and charges shall not be revised so long as the net earnings of the railway companies shall produce less than 10 per cent. per annum of the capital actually expended in the construction and equipment of the railway line, but no reduction shall be made unless the net income of the company shall be greater than 10 per cent. upon the capital so actually expended, exclusive of the aid given by the province.

"(c) At that time, the Canadian Northern Railway Company was not in existence, nor was there any line between Fort William and Winnipeg, except the line of the Canadian Pacific Railway Company. On the opening of the line of the Northern Pacific and Manitoba Railway, from Duluth to Winnipeg, by the direction of the Manitoba Government, rates were fixed by that company, which were lower than the rates of the Canadian Pacific Railway Company from Fort William to Winnipeg.

"(d) Between Port Arthur and Fort William and the undermentioned points, under Canadian Pacific Railway Company tariff No. 62, the 1st May, 1887, the following rates had been in effect for some years:—

| | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 |
|---|---|---|---|---|---|---|---|---|---|---|
| Winnipeg, Emmerson, Morris | 133 | 112 | 92 | 69 | 63 | 49½ | 35 | 35½ | 39½ | 29 |
| Portage la Prairie | 141 | 118 | 84 | 71 | 64 | 54 | 38 | 27½ | 54 | 31½ |
| Brandon ..... | 158 | 132 | 105 | 79 | 71 | 60½ | 42 | 41 | 60½ | 35½ |

"After the Northern Pacific and Manitoba Government agreement was assented to, on the 4th September, 1888, the following rates were printed by the Canadian Pacific Railway Company, in their tariff No. 118, the 25th October, 1888:—

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| | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 |
|---|---|---|---|---|---|---|---|---|---|---|
| Winnipeg, Emmerson, Morris | 116 | 98 | 80 | 66 | 57 | 47 | 35 | 35 | 35 | 27 |
| Portage la Prairie | 125 | 105 | 85 | 69 | 59 | 51½ | 38 | 37 | 39½ | 29½ |
| Brandon ..... | 142 | 119 | 96 | 77 | 66 | 58 | 42 | 40½ | 46 | 33½ |

"But no reduction was made in the Regina rates by this tariff, which left those rates as they had been for some years before, as follows:—

| | 1 | 2 | 3 | 4 | 5 |
|---|---|---|---|---|---|
| Regina ..... | 197 | 164 | 131 | 99 | 89 |

"And the Board has found, as a fact, that the above-mentioned reductions in the Canadian Pacific Railway Company's rates in Manitoba were caused by the action of the Northern Pacific and Manitoba Railway Company in reducing its rates between Duluth and Winnipeg, which, in turn, was brought about by the said agreements with the Manitoba Government.

"(c) Afterwards, the Canadian Northern Railway Company was incorporated and acquired the lines of railway of the Northern Pacific and Manitoba Railway Company, in the province of Manitoba, subject to the agreements with the Government of the province of Manitoba above referred to.

"On the 11th February, 1901, an agreement was made between the Government of the province of Manitoba and the Canadian Northern Railway Company, confirmed by the legislature of that province, by ch. 39 of the statutes of 1901. By the terms of the last-mentioned agreement, the Government of the province of Manitoba agreed to guarantee the bonds of the Canadian Northern Railway Company, to the amount and upon the terms mentioned in the agreement, and to grant and confer upon the said company certain valuable franchises, benefits, and advantages, as in the agreement and statute is more fully set forth; and, as the consideration therefor, the Canadian Northern Railway Company agreed to make a reduction, amounting to about 15 per cent. of the tariff rates then in force, for the carriage of all freight (other than grain) from and to points in Manitoba, and from and to points in Manitoba from and to Fort William and Port Arthur. By the same agreement, the Canadian Northern Railway Company was empowered to lease from the Government of Manitoba and to acquire and operate the Northern Pacific and Manitoba Railway line.

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"(f) The Canadian Northern Railway was completed in February, 1902, from Port Arthur to Winnipeg, and in the company's tariff, the 21st April, 1902, the following rates to Manitoba points were established.

| | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 |
|---|---|---|---|---|---|---|---|---|---|---|
| Fort William to Winnipeg. | 89 | 75 | 60 | 45 | 40 | 34 | 25 | 25 | | 20 |
| Portage la Prairie ..... | 105 | 88 | 70 | 53 | 48 | 40 | 28 | 29 | | 23 |
| Brandon ..... | 120 | 100 | 80 | 60 | 54 | 46 | 32 | 32 | | 27 |

"(g) These are the rates in effect at the present time; and, owing to the competition existing between the two railway companies, were adopted by the Canadian Pacific Railway Company in its tariff dated the 10th May, 1902.

"(h) The Canadian Pacific Railway Company was not a party to any of the agreements above mentioned, and was not legally bound to make the reductions it did in the province of Manitoba, but, in order to hold its business, as a result of competition, it did, in fact, reduce its rates.

"(i) Subsequently, the Canadian Northern Railway Company, having obtained authority from the Parliament of Canada, extended its lines beyond the confines of the province of Manitoba, and constructed lines of railway in the province of Saskatchewan, which entered into competition there with the lines of the Canadian Pacific Railway Company in that province, at many points, the city of Regina being one of the points common to both lines.

"(j) In the present case, the City of Regina has complained that the rates to Regina from Fort William are higher in proportion than the rates from Fort William to Winnipeg, and are, therefore, unjustly discriminatory as between localities.

"The said rates are, in fact, higher in proportion.

"The Board has held that it was not the intention of Parliament, in passing sec. 315 of the Railway Act, to permit railway companies to create different circumstances and conditions by entering into a contract with some one and so defeat the intention of the section, and that the circumstaces and conditions which, if not substantially similar, may justify different treatment of different localities, must be traffic circumstances or traffic conditions, not circumstances and conditions which may be artificially created by contract.

"The Board has also held that it has been proved that the special class freight tariffs of the Canadian Northern

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Railway Company and the Canadian Pacific Railway Company, between Port Arthur and Fort William and points west thereof, unjustly discriminate in favour of Winnipeg and other points in the province of Manitoba, to the prejudice and disadvantage of Regina anl Moose Jaw, and other points west of that province, and that the companies should be required to reduce their rates so as to remove this discrimination by publishing and filing new tariffs.

"The questions for consideration of the Supreme Court of Canada are: Were the facts set out above, and more fully referred to in the record herein, circumstances and conditions, within the meaning of the Railway Act, which justify the existence of lower rates from Fort William to Winnipeg than to Regina: (a) with regard to the Canadian Northern Railway Company; (b) with regard to the Canadian Pacific Railway Company?"

The appeal was heard by FITZPATRICK, C.J.C., DAVIES, IDINGTON, DUFF, ANGLIN, and BRODEUR, JJ.

F. H. Chrysler, K.C., for the appellants the Canadian Pacific Railway Company.

J. S. Ewart, K.C., and George F. Macdonnell, for the appellants the Canadian Northern Railway Co.

Wallace Nesbitt, K.C., and J. F. Orde, K.C., for the respondents, the Regina Board of Trade.

FITZPATRICK, C.J.C.:—The Board of Railway Commissioners has found as a fact, which is not open for argument on this appeal, that the special class freight tariffs of the appellants in question unjustly discriminate in favour of Winnipeg and other points in Manitoba to the prejudice and disadvantage of Regina and Moose Jaw and other points west of Manitoba.

It was contended by the railway companies that this discrimination was justified by certain agreements between one of the railway companies and the Manitoba Government. The question submitted on this appeal is: Are those agreements "circumstances and conditions," within the meaning of those words as used in sec. 315 of the Railway Act, to be taken into consideration by the Railway Commissioners upon a complaint of unjust discrimination made by the Board of Trade of Regina, that city being a shipping point affected

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by those freight tariffs? That those agreements are "circumstances and conditions" to be taken into consideration by the Board of Railway Commissioners, in considering the question of unjust discrimination, cannot, it seems to me, be doubted; but it is for that Board to decide what effect is to be given to them in the circumstances; and I am entirely at a loss to understand what is the question of law involved. It is for the Board of Railway Commissioners to say, having taken the agreements into consideration as relevant facts, if they will give any and what weight to those agreements.

The statute 1 Edw. VII. ch. 53, sec. 3 (D.), confirming the agreement specially, says that it shall not be construed so as to create discrimination:—

"Nothing in this Act or in the indentures contained in the schedules hereto, or done in pursuance of this Act or of the said indentures, shall

"(c) authorise the Canadian Northern Railway Company, contrary to the meaning of the Railway Act, to charge or demand any discriminating rate for the carriage of freight or passengers, or to allow or make any secret or special tolls, rebate, drawbacks or concessions, or any higher rates for the carriage of freight or passengers than those heretofore or hereafter fixed under the authority of existing or future legislation of the Parliament of Canada, by the Governor in Council, or by the Railway Committee of the Privy Council, or by any commission or other authority.

I would dismiss with costs.

IDINGTON, J.:—In answer to the questions submitted herein, I am of opinion that the facts set out in the case stated by the Assistant Commissioner of the Board of Railway Commissioners for Canada do not constitute and are not "circumstances and conditions" within the meaning of the Railway Act, which, of imperative legal necessity, justify the existence of lower rates from Fort William to Winnipeg than to Regina, either by (or "with regard to") the Canadian Northern Railway Company or the Canadian Pacific Railway Company.

I cannot read the questions submitted as counsel for the railway companies contended they must be read; and, therefore, try to make my meaning clear by the interposition of the words "of imperative legal necessity." In any other



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sense than that I thus adopt, I do not consider that any question of law, such as can be submitted to this Court, is involved. In other words, notwithstanding the facts set out, the Board of Railway Commissioners is not as a matter of law (such as may be submitted in appeal to us as provided by the statute) required to permit the continuation of such discrimination.

The appeal should be dismissed with costs.

DUFF, J.:—The question whether, in the circumstances presented in this case, there has been unjust discrimination, is, in my opinion, committed to the Board of Railway Commissioners for decision as a question of fact by sec. 318 of the Railway Act. That Board, in deciding such a question, is, of course, to act judiciallly, and, consequently, to have regard to all relevant facts. Since the decision of this Court in Montreal Park and Island R. W. Co. v. City of Montreal, 43 S. C. R. 256, it is, I think, not open to dispute here that the "circumstances and conditions" referred to in the questions submitted are facts relevant to the point in issue. It is impossible, therefore, either to affirm or to deny as a proposition of law that those "circumstances and conditions . . . justify" (in the language of the question) "the existence of lower rates from Fort William to Winnipeg than to Regina." Whether that is so or not is a question of fact; and the Board of Railway Commissioners is the tribunal appointed by law to pass upon it.

DAVIES, J.:—I agree in the opinion stated by DUFF, J.

ANGLIN, J.:—The Board of Railway Commissioners has, under sub-sec. 3 of sec. 56 of the Railway Act, given to the Canadian Pacific Railway Company and the Canadian Northern Railway Company leave to appeal to this Court from its decision requiring these two companies to remove "the discrimination at present existing in the tariffs to points in the provinces of Manitoba, Saskatchewan, and Alberta, from Fort William, Port Arthur, and points east thereof, in favour of Winnipeg, and other points in the province of Manitoba, and against points west thereof, by reducing the rates from Fort William, Port Arthur, and points east thereof to Regina and Moose Jaw and other points west of the said favoured points," upon the following question,

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stated by the Board of Railway Commissioners as being, in its opinion, a question of law:—

"Were the facts set out above, and more fully referred to in the record herein, circumstances and conditions, within the meaning of the Railway Act, which justify the existence of lower rates from Fort William to Winnipeg than to Regina: (a) with regard to the Canadian Northern Railway Company; (b) with regard to the Canadian Pacific Railway Company?"

Section 315 of the railway Act is, in part, as follows:—

315. All such tolls shall always, under substantially similar circumstances and conditions, in respect of all traffic of the same description, and carried in or upon the like kind of cars, passing over the same portion of the line of railway, be charged equally to all persons and at the same rate, whether by weight, mileage or otherwise.

4. No toll shall be charged which unjustly discriminates between different localities.

5. The Board shall not approve or allow any toll, which for the like description of goods, or for passengers carried under substantially similar circumstances and conditions in the same direction over the same line, is greater for a shorter than for a longer distance, within which such shorter distance is included, unless the Board is satisfied that owing to competition, it is expedient to allow such toll.

6. The Board may declare that any places are competitive points within the meaning of this Act.

Although Winnipeg is admittedly a competitive point, that feature of the situation, it is conceded, is not now material to the question with which we are asked to deal.

Unfortunately, as too frequently happens in these cases, counsel are unable to agree upon the scope and purview of the question submitted.

Are the words "which justify" to be taken to mean, "which *may* justify," "which *do* justify," or "which *conclusively* justify" The first or the third form would raise a question of law; the second would raise a question of fact, and on that ground must be rejected, if any other interpretation is admissible.

For the appellant railway companies it is contended that we are asked to determine whether the "facts" referred to in the question submitted are or are not "circumstances and conditions" which may justify a discrimin-

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ation in rates, and which the Board of Railway Commissioners should, therefore, receive in evidence and take into account in deciding, as a question of fact (Railway Act, sec. 318), whether "the circumstances and conditions" under which traffic is carried to the several points mentioned in its order are or are not "substantially similar." Counsel for the companies stated that the Board of Railway Commissioners treated the "facts" referred to as irrelevant and practically inadmissible.

A passage in the notes of the Assistant Chief Commissioner certainly lends colour to the contention of the appellants as to the meaning of the question submitted. He said, at pp. 183-4: "The Board has held that it was not the intention of Parliament, in passing sec. 315 of the Railway Act, to permit railway companies to create different circumstances and conditions by entering into a contract with some one and so defeat the intention of the section, and that the circumstances and conditions which, if not substantially similar, may justify different treatment of different localities, must be traffic circumstances or traffic conditions, not circumstances and conditions which may be artificially created by contract."

Apart from the statutory provision to which I shall presently refer, and which, apparently, was not brought to the attention of the Board of Railway Commissioners, the question, as interpreted by counsel for the companies, is the same as that dealt with by this Court in Montreal Park and Island R. W. Co. v. City of Montreal, 43 S. C. R. 256. Because unwilling to assume that, with this very recent judgment before it, the Board of Railway Commissioners would again propound to us the very question there answered, I think the interpretation put upon the question by the appellants cannot be in accordance with the intention of the Board. If, however, that be its meaning, clause (c) of sec. 3 of ch. 53 of the Dominion statutes 1 Edw. VII. would probably prevent the companies from relying upon the agreements ratified by that Act in justification of any discrimination in rates. But, holding the view that the question submitted should not receive the interpretation put upon it by counsel for the appellants, I find it unnecessary now to decide the question as to the scope and effect of the statutory provision referred to.

For the respondents it was submitted that the Board of Railway Commissioners meant to ask this Court whether

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the "facts" referred to (which, counsel maintained, had been received by the Board in evidence and had been duly considered by it, but in determining the question of similarity of circumstances and conditions had been deemed by the Board insufficient to warrant a finding of such dissimilarity as would justify a discrimination in rates) *necessarily justify* a discrimination, and compel the Board, as a matter of law, to hold that they establish a case of dissimilarity in "circumstances and conditions" which would justify some discrimination.

To the question, so interpreted, the answer should, in my opinion, be "no." The "facts" referred to do not per se and as a matter of law conclusively establish such a case of dissimilarity in circumstances and conditions as necessarily justifies the maintenance of some discrimination in rates.

It follows from the decision in the Montreal Park and Island Railway case that, unless excluded by the statutory provisions above adverted to, the "facts" referred to in the question submitted are relevant to the inquiry which the statute contemplates the Board of Railway Commissioners shall make, and that they are, therefore, admissible in evidence and should be duly taken into account. But the weight to which they would be entitled, if any, must be determined by the Board itself, and is, in my opinion, the very kind of thing which Parliament intended that body to decide finally as a question of fact.

Because satisfied that the interpretation put upon the question submitted by counsel for the respondents was that intended by the Board of Railway Commissioners, I would dismiss this appeal with costs.

BRODEUR, J.:—A contract by a railway company with a province cannot interfere with the duty of the Board of Railway Commissioners to prevent any discrimination in freight rates affecting a city in another province.

If a province or a locality chooses to give to the railway companies some bonuses or favours for the purpose of securing some reduction in their charges, it should be done in conformity with the provisions of the Railway Act; and these companies could certainly not rely on such contracts to justify a discrimination against some other localities.

In this case, where the railway company made the contract in question with the Province of Manitoba, it was then under the legislative authority of that province.

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Later on, it became a federal company under the control of the Railway Act.

When application was made to Parliament for the purpose of confirming that contract concerning freight rates, a special declaration was made in the statute of 1901 (1 Edw. VII. ch. 53, sec. 3), that the Canadian Northern Railway Company, which was assuming that contract, would not be authorised to charge any discriminatory rate.

An agreement between a railway company under a federal charter and an individual or a group of individuals, giving to any persons or to any locality a preferential rate, constitutes discrimination under the Railway Act.

The "circumstances and conditions" which, if not substantially similar, may justify different treatment to different points, and which are enunciated in sec. 315 of the Railway Act, must be traffic circumstances or traffic conditions, not circumstances and conditions that may be created by contract.

The Board of Railway Commissioners has found that the rates from eastern points to Winnipeg and to Regina were discriminatory in favour of the former city. But it was urged that these rates had to be given to Winnipeg under the above contract, and that the Board of Railway Commissioners was bound to give effect to such a covenant. Of course, the question was considered by the Board of Railway Commissioners; but it was not bound to sanction a discrimination which Parliament itself had declared would not be confirmed.

This appeal should be dismissed. There is no reason for interfering with the discretion of the Board of Railway Commissioners.

*Appeal dismissed with costs.*

On the 22nd December, 1911, Chrysler, K.C., on behalf of the Canadian Pacific Railway Company, moved for a direction as to the settlement of the minutes.

George F. Macdonnell, for the Canadian Northern Railway Company, appeared in the same interest.

Orde, K.C., contra.

THE COURT, after consideration, pronounced judgment on the motion, as follows:—

"The Registrar shall certify on behalf of the Court to the Board of Railway Commissioners, in answer to the ques-

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tion submitted, that, in the opinion of this Court, the facts therein set out are circumstances and conditions within the meaning of the Railway Act to be considered in determining the question of unjust discrimination with respect to both railways; such facts and circumstances are not in law conclusive of the question of unjust discrimination, but the effect, if any, to be given to them is a question of fact to be considered and decided by the Board in its discretion."

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## SUPREME COURT OF CANADA.

DECEMBER 6TH, 1911.

## CLOVER BAR COAL CO. v. HUMBERSTONE.

*Railway—Board of Railway Commissioners—Jurisdiction—Private Siding — Construction of Statutes — Railway Act, R. S. C. 1906 ch. 37, secs. 26a, 226—8 & 9 Edw. VII. ch. 32, sec. 1 (D.)*

**Notwithstanding provisions in an agreement under which a private industrial spur or siding has been constructed entitling the railway company to make use of it for the purpose of affording shipping facilities for themselves and persons other than the owners of the land upon which it has been built, the Board of Railway Commissioners for Canada, except on expropriation and compensation, has not the power, on an application under sec. 226 of the Railway Act, R. S. C. 1906 ch. 37, to order the construction and operation of an extension of such spur or siding as a branch of the railway with which it is connected; DUFF, J., dissenting.**

***Blackwoods Limited* v. *Canadian Northern R. W. Co.*, 44 S. C. R. 92, applied.**

Appeal by the Clover Bar Coal Company, by leave of a Judge of the Supreme Court of Canada, from an order of the Board of Railway Commissioners for Canada, upon the question of the jurisdiction of the Board to order the construction and operation of an extension to the appellants' private industrial spur or siding across their lands.

The appeal was heard by DAVIES, IDINGTON, DUFF, ANGLIN, and BRODEUR, JJ.

J. H. Leech, K.C., and W. L. Scott, for the appellants.

F. H. Chrysler, K.C., for the respondents, William Humberstone, the Grand Trunk Pacific Railway Company, and the Clover Bar Sand and Gravel Company.

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IDINGTON, J.:—The appellants had the usual agreement with the Grand Trunk Pacific Railway Company for a siding, which was built pursuant thereto on the appellants' land. The agreement was terminable on two months' notice.

The respondent Humberstone desired siding accommodation at a point beyond this siding built for the appellants.

The Board of Railway Commissioners, on his application, ordered the said railway company to construct, maintain, and operate the said extension of the appellants' siding across their lands, taken up thereby, to and upon the respondent Humberstone's lands.

Incidentally to such order, and to enable the said railway company to execute it, the order provided that the strip of land required for the said extension, so far as owned by the appellants, should be expropriated.

The appellants contend that this order is beyond the jurisdiction of the Board of Railway Commissioners, and rely on our decision in the case of Blackwoods Limited v. Canadian Northern Railway Co., 44 S. C. R. 92, which was given after this order now questioned.

I think the appellants are quite right.

The principle upon which that case was decided was, that the Board of Railway Commissioners had no jurisdiction to enforce the construction of an isolated bit of railway, which was entirely independent of, and not connected with, or to be a branch of, the main line or branch therefrom.

The principle is as clear as can be. The Board of Railway Commissioners, in this regard, can only act within secs. 221 to 226, inclusive, of the Railway Act. These sections countenance nothing else than a piece of railway to be constructed in strict accordance with the terms of the said sections and what others are implied therein as applicable. It is idle to contend that this order can be maintained by virtue of a mere temporary private agreement such as invoked here, even if the Grand Trunk Pacific Railway Company has a right thereby to use the temporary siding for its own purposes and to permit others to use it. Indeed, when closely examined, the order, whatever it may imply, says nothing as to operating that siding, then existent, and fails to declare this, with the extension, one complete branch line or siding.

It was because the Board of Railway Commissioners seemed confessedly to rely on analogous private or personal rights that I failed to find any jurisdiction for what they had

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ordered in the Blackwoods case. And the majority of the Court seemed to agree that the power to make such an order must be within the sections I refer to.

The private right of a railway company to the use of the private siding was the basis, in each case, upon which the order rested.

An alleged equitable right by way of estoppel to supplement this was set up in the Blackwoods case, and here the terms of the private bargain of the railway company to permit others to use its acquisition of right is relied upon.

Both are entirely apart from the powers given relative to branch lines which give jurisdiction to the Board in such cases to direct or authorise branch lines, and need no supplementing of the kind in question in these cases.

It was not suggested in argument, but I have since considered the possible question of whether or not authority might be found by implication in the wide powers of the Board respecting accommodations or facilities for shipping, to direct as it has done.

I, however, fail to see how they can be used in aid, save by and through the sections I refer to.

The appeal should be allowed with costs.

ANGLIN, J.:—Assuming the respondents' construction of the agreement between the appellants and the Grand Trunk Pacific Railway Company to be correct, I think this appeal should, nevertheless, be allowed, upon two grounds—the first, that the spur of which an extension has been ordered is not part of the Grand Trunk Pacific Railway, but is a mere private siding or branch; the second, that the order of the Board of Railway Commissioners either purports unlawfully to deprive the appellants of the right of removing this spur or siding, reserved to it by the agreement under which it was constructed, or, if this be not its effect, that the order directs the construction of a branch or siding not itself connected with the Grand Trunk Pacific Railway, and which can only be reached by using the appellants' spur, which, under their agreement with the railway company, the appellants may remove at any time, upon giving two months' notice. Upon the former construction of the order, there has been an unwarranted interference with the appellants' contractual rights; upon the latter, no permanent or sufficient provision is made for connecting the extension of the siding or branch

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line directed to be constructed and operated with the Grand Trunk Pacific Railway.

As I read the agreement under which the appellants' siding was built, it does not contemplate any extension of it. It contains several provisions inconsistent with the idea of an extension, notably that authorising the removal of their spur by the appellants; and that reserving to them a paramount right to make any proper use of the siding at all times for their business. In view of these terms of the contract, the provision for the use of the siding by the railway company, and that for its use by third parties on payment of compensation to the appellants, must, I think, refer to such uses as may be made of it as constructed under the agreement, and without extension. Several such uses were suggested in the course of the argument. It was practically conceded that, if this be the proper construction of the agreement, this appeal should succeed.

But, if the provisions for use of the appellants' siding by the Grand Trunk Pacific Railway Company and by third parties should be held, as Mr. Chrysler contended, to have been made in contemplation of an extension of the siding, and, therefore, to preclude objection by the appellants to a proper order for such extension being made, they do not suffice to uphold the jurisdiction of the Board of Railway Commissioners to make the order now before us.

As pointed out in the case of Blackwoods Limited v. Canadian Northern R. W. Co., 44 S. C. R. 92, more particularly in the judgment of my brother Duff, at pp. 96 et seq.—the appellants' spur, constructed solely under the authority of their agreement with the Grand Trunk Pacific Railway Company, must be treated as a private siding or branch, not in any sense part of the Grand Trunk Pacific Railway. Its connection with the railway, because lawful without authorisation by the Board of Railway Commissioners, raises no presumption that such authorisation was obtained. As a private siding, the Board, in my opinion, had not jurisdiction to order its extension, unless it first provided in a proper and legal manner for its becoming part of the Grand Trunk Pacific Railway. This it might have done by directing the expropriation by the railway company of the land on which the siding is constructed. That would, of course, involve compensation to the appellants.

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If the order of the Board deprives the appellants of their contractual right, upon notice to remove their siding, it in effect makes that siding part of the Grand Trunk Pacific Railway without any provision entitling the appellants to compensation for the land thus taken. If, notwithstanding the unqualified order for the construction and operation of the extension, the appellants still have the right to remove their spur, and thus to destroy the connecting link with the Grand Trunk Pacific Railway, upon their exercising that right the extension would have no connection with the Grand Trunk Pacific Railway, and, without some further order or provision, its operation by the railway company would be practically impossible.

For these reasons, I am of opinion that, in making the order in appeal, the Board of Railway Commissioners exceeded its jurisdiction, and that the appeal should be allowed with costs.

DAVIES and BRODEUR, JJ., agreed with the opinion expressed by ANGLIN, J.

DUFF, J. (dissenting) :—I entertain no doubt that, under article 6 of the agreement between the appellants and the railway company, the company is entitled to use the existing spur for the purpose of affording such facilities for shipping and taking delivery of freight as it may be their duty to give to persons other than the appellants. That being so, I can see no reason why, under the authority of sec. 226 of the Railway Act, the Board of Railway Commissioners may not order such facilities to be furnished by means of an extension of the spur. The case radically differs from the case of Blackwoods Limited v. Canadian Northern R. W. Co., 44 S. C. R. 92. There (according to the state of facts presented to this Court) the rights of the railway company in respect of the spur which it proposed to make part of its branch were limited to the use of it for the purpose of supplying facilities to the owners of the land on which it was constructed. The application was one by the railway company for approval of a branch line; and the order of the Board of Railway Commissioners, consequently, if it was to be treated as an authority to construct a branch capable of being worked in connection with the railway, had the effect of the imposing of an additional servitude upon the lands of the Black-

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woods without compensation. That, we thought, the Act did not authorise. The order now before us leads to no such result; and I am unable, with great respect, to understand why it is not a valid exercise of the powers conferred by sec. 226 of the Railway Act.

I ought, perhaps, to refer to the point made by Mr. Scott, that the use of the appellants' spur for the purpose of affording facilities to the respondents is necessarily incompatible with the observance by the company of the condition prescribed by article 6 of the agreement, that the use of the siding by or for the benefit of other persons "shall not interfere with the proper use" of it "for the business" of the appellants.

It may be observed in this connection that, under sec. 26 (a) (8 & 9 Edw. VII. ch. 32, sec. 1), the Board of Railway Commissioners is invested with the fullest powers respecting the enforcement of such contractual stipulations. Whether there is any incompatibility between the order under appeal and the provisions of article 6 of the agreement appears to me to be peculiarly a question of fact for the Board.

I may say, further, with reference to the construction of article 6, that the construction now put forward was not relied upon at the hearing before the Board of Railway Commissioners, and, indeed, seems to be an afterthought suggested by the decision of this Court in the case of Blackwoods Limited v. Canadian Northern R. W. Co., 44 S. C. R. 92.

*Appeal allowed with costs;* DUFF, J., *dissenting.*

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## SUPREME COURT OF CANADA.

DECEMBER 6TH, 1911.

### BRITISH COLUMBIA LAND AND INVESTMENT AGENCY v. ISHITAKA.

*Chattel Mortgage — Sale under Powers — Notice — Offer to Redeem — Tender — Equitable Relief — Evidence — Proceedings Taken in Good Faith.*

**To impeach a sale under powers in a chattel mortgage, on the ground that an offer to redeem was made prior to the time fixed by the notice of sale, the person entitled to redeem is obliged to shew**

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**that the amount due under the mortgage was actually tendered, or that the mortgagee was distinctly informed that the mortgagor was then and there ready and willing to pay what was so due, and, being thus informed of the intention to redeem, that the mortgagee refused to accept payment.**

**In the exercise of his power of sale, a mortgagee of chattels is bound merely to act in good faith and avoid conducting the sale proceedings in a manner so recklessly improvident as to sacrifice the goods by sale at undervalue.**

**Judgment of the Court of Appeal for British Columbia, *Ishitaka v. British Columbia Land and Investment Agency Limited*, 18 W. L. R. 310, reversed; FITZPATRICK, C.J.C., and IDINGTON, J., dissenting.**

Appeal from the judgment of the Court of Appeal for British Columbia, Ishitaka v. British Columbia Land and Investment Agency Limited, 18 W. L. R. 310, reversing the judgment of MORRISON, J., at the trial, and ordering a judgment to be entered in favour of the plaintiff for damages to be assessed.

The plaintiff claimed damages for the wrongful seizure and sale of his goods by the defendants assuming to act in virtue of powers contained in a chattel mortgage.

The appeal was heard by FITZPATRICK, C.J.C., DAVIES, IDINGTON, DUFF, ANGLIN, and BRODEUR, JJ.

J. S. Ewart, K.C., for the appellants. The judgment appealed from is erroneous in respect of the facts in controversy; there was no tender nor any waiver by the appellants of the necessity for tender. Even if the sale took place prior to the hour of sale mentioned in the notice, it was, nevertheless, valid, inasmuch as the appellants were not bound to await the expiry of time given voluntarily and without consideration. If the judgment in appeal can be so construed as to hold that the sale was improvident or that the appellants wrongfully seized goods which are not included in the mortgage, then such findings cannot be justified upon the evidence. I refer to In re Farley, 2 DeG. M. & G. 936; Halsbury, vol. 7, pp. 419, 420, note (q); Hawkins v. Ramsbottom, Price 138; Major v. Ward, 5 Hare 598; Williams v. Stern, 5 Q. B. D. 409; Blumberg v. Interests and Reversionary Securities Corporation, [1897] 1 Ch. 171.

Travers Lewis, K.C., and Ladner, for the respondent. The trial Judge erred in finding that the respondent did not offer to redeem in time, and in refusing him damages suffered by reason of the appellants preventing redemption, or, in the alternative, damages by reason of improper exercise of the power of sale; also in refusing damages for the sale of goods

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of the respondent which were not included in the chattel mortgage. Reference is made to Bac. Abr. 7, 722; Ex p. Danks, 2 DeG. M. & G. 936; Harris on Tender, pp. 69-70; Major v. Ward, 5 Hare 598; Kennedy v. DeTrafford, [1896] 1 Ch. 762; Latch v. Furlong, 12 Gr. 303; Aldrich v. Canada Permanent Loan and Savings Co., 24 A. R. 193; and Ex p. Moore, 2 Ch. D. 802.

DUFF, J.:—The grounds of action relied upon at the trial were: first, that goods not comprised in the bill of sale were sold by the appellant company; and, secondly, that the sale was made after the amount of the mortgage-debt had, in effect, been tendered. As to the first of these grounds of action, I think the weight of evidence supports the conclusion of the trial Judge. As to the second, I think the respondent, in order to make that ground the basis of a successful contention that the sale was in violation of his rights, must shew either that he made a tender or that the mortgagees, being apprised of the fact that he (the mortgagor) was in a position and ready to pay the amount secured by the mortgage, refused to accept payment.

The learned trial Judge obviously entertained no doubts as to the good faith of either Mr. Wallbridge or Mr. Garrett; and, I think, the conclusion to which he ultimately came, after considering all the circumstances, namely, that there had been a misunderstanding, is the most probable explanation of the conflict of testimony which has unfortunately occurred. Mr. Wallbridge appears to have had in his mind and to have been only prepared to tender a sum considerably less than the amount which in fact was required to pay off the mortgage; and, in such circumstance, one need not be surprised that he and Mr. Garrett should now prove to have been at cross-purposes.

The mortgage-debt had been in arrears for something like six months. Various extensions of time had been granted; and, finally, about ten days before the 1st May, the respondent had been informed that payment must be made before noon on that day. Further requests for extensions continued, but it is not suggested that the respondent actually informed the mortgagees that he was ready to pay the debt until less than two hours before the hour fixed. The onus was on the respondent to shew that he tendered the amount due, or that he distinctly and unmistakably made the mortgagees' agents

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aware that he was ready then and there to pay it, and that, thus informed of his readiness to pay, they refused to receive it. In this, I think, he has failed.

A further ground of action was relied upon in the Court of Appeal—that the property was sold at an undervalue, owing to the absence of such steps as the mortgagees were bound to take in order to protect the interests of the respondent in securing the best price. It is to be observed that the duty of a mortgagee in exercising a power of sale (as touching the measures to be taken to secure a good price for the property sold) has recently been stated by a very high authority, Kennedy v. De Trafford, [1897] A. C. 180, Lord Herschell, at p. 185, Lord Macnaghten, at p. 192; Nutt v. Easton, [1899] 1 Ch. 873, per Cozens-Hardy, J., at pp. 877 and 878. The sum of the matter appears to be this. He is bound to observe the limits of the power, and he is bound to act in good faith, that is to say, he is bound to exercise the power fairly for the purpose for which it was given. If the mortgagee proceeds in a manner which is calculated to sacrifice the interests of the mortgagor, and if his course of action is incapable of justification as one which, in the circumstances, an honest mortgagee might reasonably consider to be required for the protection of his own interests; if he sacrifice the mortgagor's interests, "fraudulently, wilfully, or recklessly," then, as Lord Herschell says, it would be difficult to understand how he could be held to be acting in good faith. But that is a vastly different thing from saying that he is under a duty to the mortgagor to take (regardless of his own interests as mortgagee) all the measures a prudent man might be expected to take in selling his own property. The obligation of a trustee, when acting within the limits of the power, would be no higher: Learoyd v. Whiteley, 12 App. Cas. 727, at p. 733; and it is clear that in exercising his power the mortgagee does not act as trustee. The evidence quite fails to establish any violation of the respondent's rights according to these principles. There is not a word in the evidence as to the selling value of the property at the date of the sale. Apart, moreover, from the inadequacy of the evidence as it stands, there is a fatal objection based upon the principle that, as a rule, a litigant, who intends to rely upon a charge of bad faith, must bring it forward distinctly at the trial. Such evidence as was relied upon in the Court of Appeal and in the respondent's factum, was not put forward in support

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of this ground of action with the object of establishing any such cause of action, and was not sifted in cross-examination with a view to its bearing on a claim of that character. Of bad faith or recklessness in the sale, as constituting in itself a cause of action, there was not, at the trial, from first to last, a single word.

ANGLIN, J.:—A careful perusal of the evidence of his solicitor has satisfied me that the plaintiff was not, at any time prior to noon on the 1st May, 1908, in a position to redeem the defendants' mortgage. For this purpose, $1,604.92 ($1,283.65 exclusive of costs) was required. Mr. Wallbridge was, not improbably, misinformed by his client as to the amount due. The latter appears to have assumed from some entries, which he says he saw in some book of the defendants, that about $1,100 was the sum needed for redemption. Negotiations by and on his behalf to raise money for this purpose proceeded on this basis for several days prior to the 1st May. Mr. Wallbridge's evidence has convinced me that the money available to the plaintiff for redemption, on the 1st May, was only about $1,100—at the most $1,150. There never was an offer to pay to the defendants, or their solicitors, more than this amount. If Mr. Wallbridge was informed by Mr. Garrett before noon on the 1st May, as he says he was, that the sale had been already concluded—a fact which I should certainly hesitate, upon the evidence before us, to find had been satisfactorily established—in the absence of proof that he was in a position to redeem, the plaintiff has not, in my opinion, made out a case entitling him to damages for a premature sale. Unless he was actually able to redeem, he, in fact, sustained no such damage.

Without at all determining that it is so as a matter of law, I proceed on the assumption that the notice given by the defendants to the plaintiff operated as a waiver of their right to sell without notice and entitled the plaintiff to redeem at any time prior to noon on 1st May, 1908.

I agree with Irving, J.A., that the plaintiff failed to prove that his chattels were sacrificed by the mortgagees or that the sale was recklessly improvident. Neither did he shew that property not covered by the mortgage was seized.

With respect, I would allow this appeal with costs in this Court and in the Court of Appeal, and would restore the judgment of the trial Judge.

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DAVIES, J., agreed with ANGLIN, J.

BRODEUR, J.:—The respondent has instituted an action in damages against the appellants for an illegal sale of goods subject to a chattel mortgage.

He asserts that he offered the amount due on the mortgage before the hour given in the notice, viz., before noon on the 1st May.

The only question of fact involved is as to whether or not, on the morning of the 1st May, a sufficient tender to pay the whole amount due was made.

The respondent's solicitor says, in his evidence, that he went on the morning of the 1st May to the office of the appellants' solicitor; that he asked him for the amount that was proper to redeem the mortgage, and that he was willing to give him a cheque, and he was informed that the chattels had been sold.

The appellants' solicitor does not remember having seen the other solicitor, but says that, after 12 o'clock, he telephoned to him about making a tender, and he answered him that it was too late.

If the circumstances are such as narrated by the respondent's solicitor, he should have made a quick rejoinder and taken the necessary steps to shew that he was still in time to make the offer. But he said nothing.

Besides, he does not prove that he was ready to pay the whole amount due. The evidence shews that the amount due was over $1,500. However, the respondent's solicitor says that he was "willing to give a cheque for $1,100, and, if they said they could not make up an exact statement to $25, or $50, I would have given it;" and his own statements go to shew that he did not expect that an amount of $300 or $400 more could be claimed under the mortgage.

The tender, if made, was not sufficient, and the appellants were justified in making the sale.

It has been stated that the sale was improvident, and that the price obtained was not high enough.

In the notice for sale served upon the respondent, he was told that the chattels would be sold for $1,500 if the mortgage was not paid. It was, evidently, the best price that could be obtained. It did not even cover the whole amount due.



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It was then for the respondent to find out some purchaser at a better price; and I cannot say that the sale was improvident.

I would allow the appeal with costs.

IDINGTON, J. (dissenting):—Want of good faith on the part of the mortgagee selling under a power of sale is sufficient, if the vendee is a party to it, to entitle the mortgagor to have the sale set aside. Short of setting the sale aside, he has also a right to recover from the mortgagee damages suffered by reason of the existence of want of good faith.

Some indirect motive on the part of the mortgagee operating to the detriment of the mortgagor is sufficient foundation for such an action. As pointed out by Jessel, M.R., in Nash v. Eads, 25 Sol. J. 95, mere indirect motives, such as anger, that lead only to a properly conducted exercise of the power, are not such as I refer to. In that case Jessel, M.R., added, in speaking for the Court of Appeal, consisting of himself and Cotton and Lush, L.JJ., thus: "He, like a pledgee, must conduct the sale properly, and must sell at a fair value, and he could not sell to himself."

A sale at such a gross undervalue as to lead to the proper inference that a fraudulent purpose existed is also held by the authorities quite sufficient ground of attack.

In Kennedy v. De Trafford, [1896] 1 Ch. 762, in appeal, [1897] 1 A. C. 180, Lord Herschell sets forth the principle to be observed, as follows: "Lindley, L.J., in the Court below, says that 'it is not right or proper or legal for him either fraudulently or wilfully or recklessly to sacrifice the property of the mortgagor.' Well, I think that is all covered by his exercising the power committed to him in good faith. It is very difficult to define exhaustively all that would be included in the words 'good faith,' but I think it would be unreasonable to require the mortgagee to do more than exercise his power of sale in that fashion. Of course, if he wilfully and recklessly deals with the property in such a manner that the interests of the mortgagor are sacrificed, I should say that he had not been exercising his power of sale in good faith."

It is quite clear that when a man has given another an absolute power to sell his goods, in a given event, he must be entitled to presume that it will be exercised honestly and with a proper regard to what honest conduct implies.

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On the other hand, he, given such a power, clearly never was intended to subject himself to be hampered in the business or harassed by reason merely of the goods having brought less than might under other and more favourable conditions have been realised.

In every case I have seen, and I have read all that have been referred to, the Court has been (when the case turned on the question of sale at underprice) careful to observe whether or not there was anything but mere underprice; and, I think, in measuring the effect of a sale at less than the goods might have been sold for, regard must be had to all the circumstances in each case.

A man selling at public auction, after due advertisement and proper effort at the sale to realise the best possible price, might be able to justify to the full a sale to a single bidder at a price he could not be able to justify if, he being absolutely ignorant of the value of the goods over which he had such power, had rushed into the street and sold the same goods at the same price to the first man he met.

In this case, the goods mortgaged had, a year and a half before the sale, cost over twice as much as the mortgagee sold for; these, it was assumed, were the same goods.

The mortgage had been taken to secure $1,800, at 6 per centum per annum.

There was paid, before the proceedings in question, a total of $719, according to the respondent, and, according to an officer of the appellants, only $674. I assume the latter to be correct, and that, as he puts it, with interest there was $1,274 due.

The appellants allege in evidence that the respondent had broken his promises of payment, and then a distress warrant was given on the 19th April, 1909, to seize.

The respondent, having learned in some way, not clear, of this, went on the 22nd or 23rd April, 1909, to the appellants' office to get a statement of what was due, in order to raise the money. When there, he was served by the appellants' agent with a notice that bears the date of the 21st April, 1909, and says that they had entered into possession of all the goods covered by the chattel mortgage, and proposed to sell the same by private sale on the 1st May, 1909, at twelve o'clock noon, for the sum of $1,500, and that, unless all moneys due on the mortgage were paid on or before the 1st May, 1909, the said sale would be consummated and pos-

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session transferred to the purchaser for the said sum of $1,500. I may observe that the notice was not addressed to the respondent, but to the original mortgagors.

One Allman, who was with the respondent, says it was after three o'clock in the afternoon, and too late to search the records that day, but next day he would have been ready to pay the amount and take the security offered, and asked for that delay, but was told there was no alternative but paying before eight o'clock that night.

The result seems to have been to discourage and delay the respondent, and negotiations with Allman fell through. Later, he seems to have approached one Kato and arranged with him to raise the money; possibly, I infer, on more moderate terms than Allman was inclined to give.

Kato was examined, and, I infer, was quite willing to have raised the money, but, when asked the question, was met by an objection of the appellants' counsel to it as evidence. Without ruling on this, the Court seemed to intimate such a reliance on previous evidence relative to such negotiations that the question remained unanswered.

I may remark here that, when the solicitor through whom that loan was to have been made was called to speak thereto, similar objections were raised, and were met by a suggestion on the part of the respondent's counsel that he supposed Mr. Wallbridge's statement was accepted. The Court replied that the solicitor could not know about that. I merely note these tenderings of evidence on this head, and will refer thereto and to the objections later when dealing with Wallbridge's alleged intention to tender.

The appellants had sold the outfit to one Bowes for $1,500 on the 18th or 19th April, to become operative if title could be made on the 1st May. Bowes paid $100 to bind the bargain. He had never seen the goods, and, so far as appears, knew nothing of them except from the list. He had agreed with the appellants, as part of his agreement to purchase, to go up to where the goods were, with an officer, and take and keep possession till the time had elapsed for his purchase to become operative.

It cannot be said that such a conditional sale was ipso facto invalid, unless we discard the authority of Wigram, V.-C., in Major v. Ward, 5 Hare 598, at p. 604. But certainly, in observing that case and its authority, we must not overlook what the learned Judge there said, at p. 604.

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He said: "I do not give any opinion how it would be, if an undervalue or any special circumstance were suggested, calculated to impeach the sale."

This purchaser pretends that what he paid was a fair price, but yet admits that his purchase was "a highly desirable one."

The officer was instructed to put the goods, when seized, into the possession of the purchaser.

The whole proceeding tended much to damn the respondent's chances of raising the money, which a delay of a day, as it impresses me, would, in all probability, have enabled him to do without the expenses being multiplied.

It was a case of one man, entirely ignorant of what he was selling, bargaining with another, equally ignorant of what he was buying, but willing to gamble upon it.

And, even though he does not seem to have got all the goods covered by the mortgage, he does not complain.

We have no satisfactory explanation of why such haste was made to prosecute the seizure by sending out an expensive expedition, in face of negotiations on the 22nd or 23rd to raise the money, though the warrant was issued on the 19th, and its execution delayed till these later dates, or why the transaction assumed the form it did, when both parties were in the dark as to what they bargained about or its value.

And we have no evidence of any disinterested person to speak on behalf of the appellants as to value, and none is given discrediting estimates adduced on behalf of the respondent.

The bargain was for the sale and purchase of the goods covered by the chattel mortgage. Strangely enough, the bill of sale to Bowes, to carry it out, assigns goods in a list, of which some never were covered by the chattel mortgage, and a number of things covered by the description of the goods as given in the mortgage do not appear in this list of goods as assigned. And thus the respondent is left liable for a balance yet payable on the chattel mortgage, though, evidently, Bowes would gladly have paid enough to relieve him.

In the absence of evidence of value of those omitted or those wrongfully included, this feature of the case is only of some importance as shedding light on the recklessness with which the whole business was transacted.

Another insignificant thing is, that the officer seizing says he was to give up the goods if paid $1,500 and his fees.

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What is meant by this? There was no such sum as $1,500 due on the mortgage apart from his fees and expenses.

Was the officer only concerned as to his fees? And had Bowes, in fact, managed all the rest, including the vessel's hire and that of the men?

A cheque was passed afterwards to the Sheriff inconsistent with that—but why, if these instructions were in accord with and suitable to the actual facts?

The sale would have been hard to maintain in face of the reckless sacrifice made and the arrogant conduct and contemptuous disregard of the appellants, in their conduct, and all the attendant circumstances here related, of all fair consideration for the respondent's rights in the premises; but, when we find, as I think we ought, that, early in the forenoon of the 1st May, the respondent's solicitor, when calling upon the appellants' solicitors to pay them off, was told he was too late, that the goods had been sold, I cannot see how such a transaction should be maintained.

It is as clear as anything can well be, in this case, that the respondent, on the 22nd or 23rd April, which I have taken to be the date of service of notice upon him (though the 23rd or 24th is more frequently given as the time), was negotiating to pay off the appellants, having learnt elsewhere or otherwise of some proceedings being on foot to enforce the mortgage, and that, upon receiving this notice, he relied thereon, and become, by virtue of its terms and the circumstances leading up to and surrounding it, entitled to rely thereon as giving him the time named to redeem.

It is because of bad faith evinced in all I have shewn on the part of the appellants that the transaction sought to be impeached can be successfully attacked. And, if we have to add to that mass of evidence the further finding of a breach of common honesty in violating good faith by withdrawing such a proposal, knowing that the party was given, both orally and thus in writing, the assurance it shews, can we think of the whole business but as a fraudulent device to defeat the just rights of the respondent?

The case of Williams v. Stern, 5 Q. B. D. 409, so much relied upon, seems entirely beside the point raised here. It was held there that there had been no such reliance put upon the defendant's promise as to furnish binding consideration. That cannot be said here. Indeed, I think the respondent's misfortune was to have this notice thrust upon him when, in

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fact, he was negotiating with a man who would have relieved him next day, if that had been the term.

The fatal tendency of some people is to put off till to-morrow, for any excuse, what should be done to-day. And the respondent does not seem to have been an exception to that class, and put off till the next day. And then, by reason of his solicitor having been told he was too late, nothing more was done.

I think, from expressions of opinion of the learned trial Judge, he, evidently, at the trial, was impressed with the correctness of Mr. Wallbridge's evidence, though, later in his judgment, charitably covering the incident as a misunderstanding.

It is quite likely that this latter is a correct finding, but it does not displace what Mr. Wallbridge states, or his client's rights. And the Court of Appeal has so found consistently with any theory of honest error on the part of the appellants' solicitor. I do not think the appellate judgment should be disturbed. It rests on ground which is distinctly taken in the pleadings and the notice of appeal; and, on the facts, apart from the doubt as to the time of tender, ought to remain undisturbed.

I may say a word as to the question of Mr. Wallbridge being in a position to carry out his tender. If a man goes with a cheque, or anything not legal tender, to offer another, he is entitled, if the other broadly refuses to accept anything, to act thereon. If the other refuses because of want of legal tender, the opportunity to remedy that can be made use of if time permit; and here the time existed, I infer, before noon.

And, short of proof that the tender has been a sham, I see no answer that can let him, peremptorily declining in broad terms, escape the consequences of his refusal.

The case of Jenkins v. Jones, 2 Giff. 99, where tender of the debt without costs, which had not been ascertained, was held sufficient, may well be looked at in this connection, and especially in light of what Mr. Wallbridge says he was prepared to do.

I think this appeal should be dismissed with costs.

FITZPATRICK, C.J.C. (dissenting):—I have nothing to add to what my brother Idington says as to the legal rights of a mortgagee who sells the property mortgaged under his power of sale. His obligation to exercise that right in perfect

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good faith is fully established by the authorities to which he refers, if authority be required to support that proposition.

On the facts, I would add: The only question is, whether or not we should reverse the provincial Court of Appeal, on evidence from which we must, at least, admit, putting it at the very lowest, one may fairly infer that the respondent, on receipt of the notice of the appellants' intention to sell, by private sale, the goods and chattels covered by the chattel mortgage, placed himself in a position to redeem them, and, being in that position, did actually offer to redeem them within the stipulated time. Mr. Wallbridge swears very positively, and his memory is refreshed by entries in his day-book made at the time, that on the morning of the 1st May he went to the office of the appellants' solicitors prepared to redeem, and that he was then told by Garrett that it was too late. It is quite true that he is not so positive that he asked for a statement of the amount due on the mortgage; but he swears that "they were not in a position to give a statement at the time any way."

In my opinion, the basic fact upon which all turns is, that the respondent had at his disposal, or could procure, the amount required to redeem before the delay to do so had expired. The property covered by the chattel mortgage was worth at least double the amount at which it was offered by private sale, and it was, probably, worth more to the respondent in his logging business than to any one else. In these circumstances, it is not reasonable to suppose that he (the respondent) would allow the property to be sacrificed if it was at all possible for him to redeem it. I am much impressed by an incident which occurred at the trial when counsel for the respondent, on an objection made by the appellants, abstained from putting in some evidence which it was desired to introduce to shew that Ishitaka was actually in a position to redeem the mortgage.

The trial Judge then declared that there were negotiations to raise $1,500 on Kato's property, and that he was willing to let that go in as security for the loan; and, on that ground apparently, he maintained the objection to the evidence. That this point, upon which so much depends, namely, the ability to redeem the mortgage, should have been and would have been, were it not for this objection, investigated further, is obvious; and I am satisfied that the trial Judge refused to admit the evidence because, with all the facts fresh in his

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mind, he was of opinion that the respondent's contention that he then had the money under his control was sufficiently established.

As to the sufficiency of the tender, it is not argued that what Mr. Wallbridge did constituted a legal tender; but, if a debtor tells his creditor that he comes to pay his debt, and the creditor says that he is too late, or for any other purpose refuses to accept the money, the actual production of the money is dispensed with.

Even if there was doubt as to which of the two views of the evidence should prevail, it seems to me that this Court should not disturb the judgment of the provincial Court of Appeal, which apparently adopted that view of the evidence which the trial Judge entertained at the time of the trial and when the witnesses were all before him. The inherent probabilities are that, in view of the intrinsic value of the property, the respondent was able to raise the money he wanted, that the solicitor was instructed to redeem, and that the solicitor did his duty in the circumstances.

In the Court of Appeal, Mr. Justice Martin says: "This is a case in which I feel I must bring myself to say, with all deference to the learned trial Judge, that the weight of evidence is clearly against his finding, and the facts respecting the important interview between the solicitors, when the plaintiff was endeavouring to redeem the mortgage, must be found substantially as testified to by the plaintiff's solicitor."

Chief Justice Macdonald accepts Mr. Wallbridge's evidence as correct, and says: "The evidence of Mr. Garrett falls far short of contradicting that of Mr. Wallbridge; and that of Mr. King, his partner, does not touch upon this point, because he was not present when this conversation took place."

I would dismiss with costs.

*Appeal allowed with costs;* FITZPATRICK, C.J.C., *and* IDINGTON, J., *dissenting.*

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## SUPREME COURT OF CANADA.

DECEMBER 6TH, 1911.

### MARCH BROS. AND WELLS v. BANTON.

*Vendor and Purchaser—Contract for Sale of Land—Condition — Payment on Account of Price — Cancellation Notice—Return of Money Paid—Rescission — Form of Action—Practice.*

**An agreement for the sale of lands acknowledged receipt of $600 on account of the price, and provided, in the event of default in the payment of deferred instalments, that the vendor might, on giving a certain notice, declare the agreement null and void and retain the moneys paid by the purchaser. On default by the purchaser to make payments according to the terms of the agreement, the vendor served him with a notice for cancellation, which incorrectly recited that the contract contained a stipulation for its cancellation, in case of default, "without notice," and concluded by declaring the contract null and void "in accordance with the terms thereof as above recited." The vendor, subsequently, refused a tender of the unpaid balance of the price and re-entered into possession of the lands. In an action by the purchaser for specific performance or the return of the amount paid, rescission was not asked for:—**

***Held*, that, as the vendor had not given the notice required by the conditions of the agreement, he could not retain the money as forfeited on account of the purchaser's default; that, as the payment had not been made as earnest, but on account of the price, the purchaser was entitled to recover it back on the cancellation of the contract; and that, as the relief sought by the action could not be granted while the contract subsisted, a demand for rescission must necessarily be implied from the plaintiff's claim for the return of the money so paid.**

**Judgment of the Supreme Court of Saskatchewan, *Banton v. March Bros. and Wells*, 16 W. L. R. 337, affirmed.**

Appeal from the judgment of the Supreme Court of Saskatchewan, Banton v. March Bros. and Wells, 16 W. L. R. 337, affirming the judgment of JOHNSTONE, J., at the trial, 12 W. L. R. 598, by which the plaintiff's claim for specific performance of a contract for the sale of lands was refused and a direction was made for the repayment to him of the sum of $600, paid on account of the price of the lands, at the time of the execution of the agreement for sale.

The appeal was heard by DAVIES, IDINGTON, DUFF, ANGLIN, and BRODEUR, JJ.

J. B. Coyne, for the appellants, the defendants in the action.

C. D. Livingstone, for the respondent, the plaintiff in the action.

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DAVIES, J.:—This was an action brought by the respondent for specific performance of an agreement for the sale of certain lands to him by the appellants, and, in the alternative, for the recovery of a part of the purchase-money paid by him at the time the agreement was entered into.

The trial Judge dismissed the claim for specific performance, on the ground of delay on the plaintiff's part in carrying out his part of the agreement, namely, in making the payments it called for. No appeal was taken from his judgment on this point. The learned Judge, however, gave judgment for the plaintiff for the $600, part of the price of the land, paid by him.

From that judgment the appellants appealed to the Supreme Court of Saskatchewan, which Court unanimously dismissed the appeal; and the appellants now appeal to this Court.

The simple and only point for our decision is, whether, in the circumstances, the plaintiff was entitled, under the pleadings and facts, to a return of the instalment of the purchase-money paid by him, or whether that payment had become forfeited to the vendors.

I take it as clear that in all cases the question of the right of the purchaser to the return of moneys paid by him—whether by way of deposit only, or "by way of deposit and in part payment of the purchase-money" or as part payment of the purchase-money only—is a question of the conditions of the contract, and the intention of the parties as expressed in or to be implied from those conditions.

If the money has been paid as a deposit simply, or, as in the case of Howe v. Smith, 27 Ch. D. 89, "as a deposit and in part payment of the purchase-money," unless the agreement contains something shewing a contrary intention, the payment is held to be a guarantee for the performance of the contract by the purchaser, who cannot recover the money back in case of his failure within a reasonable time to perform his contract. In order to enable the vendor, however, to retain, even moneys paid as a deposit, there "must be acts proved on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but which make his conduct amount to a repudiation on his part of the contract:" per Cotton, L.J., at p. 95.

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The reason, however, for holding that moneys paid either as a deposit simply, or "as a deposit and in part payment of the purchase-money," cannot be recovered back where the contract goes off by default of the purchaser, namely, that they are held as having been paid "as a guarantee for the performance of the contract," has no application to the case where moneys are paid simply on account of and as part of the purchase-money. Moneys so paid have not the character of a guarantee, and, upon rescission of the contract, the consideration for the payment being extinguished, in the absence of language in the agreement shewing a clear intention of the parties that the moneys should be forfeited, restitution must be made: Cornwall v. Henson, [1899] 2 Ch. 714, and on appeal, [1900] 2 Ch. 298; Labelle v. O'Connor, 15 O. L. R. 550.

In the case now under consideration, in my opinion, the agreement did not contain any language from which such an intention could be drawn.

On the contrary, it provided in express terms the conditions under which the vendor was entitled to hold the moneys paid as forfeited.

The clause of the agreement reads as follows: "If the purchaser shall fail to make the payments of principal or interest aforesaid or any of them, or the taxes, strictly at the times above limited, or shall fail in the performance of any of the covenants or agreements herein contained, then and in such case the vendor shall have the right at any time to declare the whole amount remaining unpaid upon this contract due and payable and to take action to collect the same and to deliver to the purchaser a deed to the said land when all of the said sums are collected, or, in the place of the foregoing, to declare this agreement null and void by giving thirty days' notice in writing to that effect, personally served upon the purchaser or mailed in a registered letter addressed to him at the post office named below, and all rights and interests hereby created or then existing in favour of the purchaser, or his approved assigns, or derived under this agreement, shall thereupon, cease and determine, and the premises hereby agreed to be conveyed shall revert to and re-vest in the vendor without any further declaration of forfeiture or notice or act of re-entry, and without any other act by the vendor to be performed or any suit or legal proceeding to be brought or taken and without any right on the part of the said pur-

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chaser or his assigns to any reclamation or recompensation for moneys paid thereon."

This clause, I think, fairly expresses the intention of the parties to have been that there should not be forfeiture of any instalments of the purchase-moneys paid on the contract unless and until the expiration of the thirty days' notice in writing therein provided to be given to the purchaser and failure during these thirty days by the purchaser to carry out his contractual obligation.

As a fact, no such notice was ever given to the purchaser, but, on the contrary, a written notice was given him on the 6th April peremptorily declaring the contract to be "now null and void." This notice was evidently given under a complete misapprehension of the real contract which the parties made.

If the contract made had contained the stipulations which the notice of the 6th April recited it did contain, and if it had vested in the vendor power in case of default in payments of instalments or of the interest or of the taxes, as the notice recited it did vest, summarily to "declare the contract null and void without notice to the purchaser," and that the vendors should in that case "retain any payments that might have been made on account of such contract as and by way of liquidated damages," a very different condition would have been created. It is unnecessary, perhaps, to say that no stipulations of the kind recited in the notice did exist in the agreement, the only stipulations being those set out in the clause of the agreement which I have inserted above.

My conclusions agree, therefore, with what I understand to be those of the Court below, that, under this contract of sale, and in the absence of any notice to the purchaser in default, such as that expressly provided for, the mere neglect and delay on the part of the purchaser, while sufficient to deprive him of his right to specific performance, did not operate as a forfeiture of the instalments of the purchase-moneys paid. These moneys not having been paid as a deposit, and not having been forfeited under the agreement of sale, and the defendants being unwilling to accept the balance of the purchase-money and convey the land, on the ground alleged by them that the agreement was at an end and rescinded, and the plaintiff having been refused by the trial Judge specific performence of the agreement on account of his delay, I am of opinion that the judgment on his

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alternative claim awarding him a return of the $600 paid by him was correct.

It was suggested that the alternative claim made by the plaintiff for a return of the $600 did not expressly ask the Court for a rescission of the contract; but I agree with Lamont, J., that it is necessarily implied in the claim made for a return of the money, for the Court could not grant the relief asked for while the contract was still a subsisting one.

It appeared in evidence that, after the refusal of the appellants to accept the tender made to them of the unpaid purchase-money, the respondents vacated possession of the land, and the appellants entered into possession of it. They have declared the agreement null and void, and have acted as if it was so. The respondent, failing to obtain specific performance, then makes his alternative claim that the agreement be rescinded by the Court and his payments refunded to him.

Under all the circumstances, ,I think the judgment appealed from is right, and that this appeal should be dismissed with costs.

DUFF, ANGLIN, and BRODEUR, JJ., concurred with DAVIES, J.

IDINGTON, J.:—The rule seems tolerably clear that a purchaser who has never in fact abandoned or receded from his contract, but yet has, by reason of laches or otherwise, from causes not falling within abandonment or rescission, deprived himself of the right to specific performance, is, in case the vendor refuse to accede to specific performance, prima facie entitled to a return of the deposit or part payment; unless some facts are shewn that would render this inequitable.

The respondent sought herein specific performance, which the present appellants resisted, and the Court thereupon, holding that specific performance could not be decreed, and that there was no abandonment of the contract by the respondent, ordered a return of the first payment of $600.

This was upheld by the appellate Court.

It is now too late to raise nice questions of pleading or relative to the accuracy of view taken of the law by the learned trial Judge or expressed by him.

He was substantially right in law if we look at the results he reached; and could have amended the pleading, if need be, to carry out his judgment.

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There was not such an abandonment or rescission from the contract as contended for.

Nor can it properly be said that there is anything inequitable in the result.

The appellants had the matter entirely in their own hands.

If they had submitted to specific performance, they would have got the balance of their money and interest, which is all they ever were entitled to, or a properly framed judgment for specific performance, which, when worked out, would have left them with the money already paid and the land—if, later, default was made in the payment of the balance.

They tried to grasp too much, and have failed in getting all. And I have no doubt that the result will leave them, so far as the mere money to be got from the land (apart from costs of their fruitless litigation) is concerned, the gainers in the long run.

I think their appeal should be dismissed with costs.

*Appeal dismissed with costs.*

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## ALBERTA.

STUART, J. FEBRUARY 17TH, 1912.

CHAMBERS.

## M. RUMLEY CO. v. GORHAM.

*Pleading—Counterclaim — Damages for Breaches of Warranty — Agreement to Release Claims for Damages — Failure to Carry out Agreement—Alternative Claim for Damages.*

In the defendant's counterclaim to an action for the price of an engine, he set forth, in the first nine paragraphs, various breaches of warranty, and claimed damages therefor. In the 10th paragraph he pleaded alternatively the execution of an agreement between himself and the plaintiffs, whereby he released the plaintiffs from all the claims previously set forth, in consideration of the plaintiffs supplying him with a new cylinder and engine bed frame and crediting him with $300 upon the promissory notes given for the price of the engine; and alleged failure to deliver the new cylinder and engine bed frame, and that he was induced to enter into the agreement by the plaintiffs representing to him that they would deliver these parts immediately; and he claimed damages for this also:—

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***Held*, that, as the defendant had himself alleged what constituted a complete answer to the allegations in the first nine paragraphs, they should not be called upon to meet them; and the first nine paragraphs were struck out.**

Motion by the plaintiffs to strike out paragraphs 1 to 9 of the defendant's counterclaim as embarrassing.

C. F. Adams, for the plaintiffs.

C. A. McGillivray, for the defendant.

STUART, J.:—The plaintiffs sued the defendant for the price of an engine. The defendant made default in delivery of his defence. His application to set the judgment aside and to be allowed to defend was refused; but I allowed him to proceed with his proposed counterclaim for damages. In his counterclaim, the defendant sets forth various breaches of warranty, and claims damages therefor, and then, in the 10th paragraph, pleads alternatively the execution of an agreement between himself and the plaintiff company, wherein, after a recital of his alleged claims for damages on account of defects in the engine, it is agreed that, in consideration of the plaintiffs supplying to the defendant a new cylinder and engine bed frame and in further consideration of the sum of $300 to be indorsed on the notes of the defendant, the defendant "admits full satisfaction of above complaint and complete fulfillment of all warranties on the above engine, and does hereby release and waive all liability of the said M. Rumley Company for both of the same, and, for the above consideration, does release the said M. Rumley Company from all action of damages whatsoever arising out of the original transaction and accruing since that time, and admits that the above consideration is in full satisfaction of all claims whatsoever in connection with above engine against said company, and that he is forever estopped from claiming any damage whatsoever either from the above defects or under any of the warranties.

The defendant then alleges failure to deliver the said new cylinder and engine bed frame, and says that he was induced to enter into this last agreement "by the plaintiffs representing to him that the plaintiffs would deliver the said parts immediately." And he claims damages for this also.

The plaintiffs allowed the defendant credit for the $300 in the default judgment which they secured.

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The plaintiffs now apply to have the first nine paragraphs of the counterclaim stricken out as embarrassing. It was agreed on the hearing that the question should be dealt with as if a point of law had been set down for argument.

In my opinion, the plaintiffs should not be called upon to meet the allegations contained in the first nine paragraphs. In Leake on Contracts, 5th ed., p. 624, it is said: "The consideration of the accord may be a new contract which is made and accepted in satisfaction; so that, if the new contract is not performed, the only remedy is by action for the breach, without recourse to the original debt or right of action." This seems to me to be only just and to be good law. I do not think the authorities cited by counsel for the defendant are applicable here.

The action will, therefore, go to trial solely upon the alleged breach of the contract pleaded in the tenth paragraph of the counterclaim, and the issues raised by the first nine paragraphs must be disregarded. These should, in my opinion, be struck out. The defendant has himself alleged what constitutes a complete answer to them, and the plaintiff should not now be called upon to meet them. It is evident that the costs of many witnesses will be saved by this method of dealing with the case.

Costs to the plaintiffs in any event on final taxation.

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## ALBERTA.

SCOTT, J. FEBRUARY 19TH, 1912.

CHAMBERS.

## MAGRATH v. RANNEY.

*Payment out of Court—Adverse Claims—Complicated Accounts.*

Lands were sold under the order of the Court in this action to satisfy the plaintiffs' claim as unpaid vendors, and the balance, after satisfaction of the plaintiffs' claim, was paid into Court. The defendant R., the purchaser of the lands from the plaintiffs, and one M., a sub-purchaser from R., both had interests in the lands sold; and, upon the defendant R. applying for payment out of the moneys in Court, M. laid claim to a portion of the moneys:—

*Held*, that the state of accounts between M. and R. must be shewn before any order could be made.



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Application by the defendant Ranney for the payment out to him of the moneys remaining in Court after payment of the plaintiffs' claim and costs.

E. B. Williams, for the applicant.

C. A. Grant, for the plaintiffs and for one Mitchell.

SCOTT, J.:—Ranney entered into an agreement for the purchase from the plaintiffs, or some of them, of 200 lots in certain subdivisions in Edmonton known as "Bellevue," and "Bellevue Addition." One Mitchell agreed to purchase from Ranney his interest in 119 of these lots and certain other lots, for $800, subject to the payment of the balance due by Ranney on the purchase of the 200 lots, the understanding between them, although not so expressed in the agreement for sale, being that the purchase-money of the remaining 81 lots retained by Ranney was to be deemed to be fully paid. Default having been made by Ranney under his agreement for purchase from the plaintiffs, they commenced this action to enforce the performance of the agreement, and such proceedings were had that 197 of the 200 lots were sold under the order of the Court, and the moneys now in Court are the proceeds of that sale remaining after payment of the plaintiffs' claim and costs.

Before the sale took place, Ranney had sold some of the 81 lots, and Mitchell had sold some of the 119 lots, and each had received payments on account of such sales from their respective purchasers. Those purchasers were not represented upon the application; and it is impossible for me, upon the material before me, to ascertain with certainty how many lots were so sold, and what amounts were received from the purchasers on account of such sales. The purchasers from Ranney who have paid him on account of their purchase-money would, in my opinion, be entitled, in priority to him, to repayment out of the fund in Court of the moneys paid by them to him. Whether Mitchell or the purchasers from him are entitled to any portion of the fund will depend upon the state of the account between Ranney and him respecting the purchase by Mitchell of the 119 lots. If the balance, if any, found to be due by him to Ranney in respect of those lots exceeds the amount of the fund in Court, I am of opinion that neither Mitchell nor the purchasers from him are entitled to any portion of it.

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Although I have endeavoured to do so, I find it impossible to ascertain from the material before me the state of the accounts between Ranney and Mitchell, or the amount, if any, that is due by the latter to the former. In fact, I have concluded that it will require the services of an expert accountant to ascertain those matters. The question is further complicated by the fact that the agreements between them relate to the purchase, not only of the 119 lots, but also of a number of other lots, the purchase-money being one lump sum for the whole, and there is no means of ascertaining the relative value of the different lots.

I direct that Ranney and Mitchell shall each file within three weeks an account verified under oath shewing which of the 200 lots were agreed to be sold by him, the amounts received from each purchaser, and the dates of the receipt thereof.

I also direct that Mitchell shall, within the same time, file an account, so verified, shewing in detail the amounts paid by him on account of the purchase from Ranney and the dates of the payment thereof.

On the hearing of the application, it was agreed by counsel for Ranney and Mitchell that if, upon the taking of the accounts between them, I should find that there was a balance due by either of them to the other, I should give judgment for the amount found due; and, as it appears that Mitchell, acting as agent for Ranney, sold certain of his lots, I direct that Mitchell shall, within the same period, file an account, verified in the same manner, shewing in detail the lots so sold by him for Ranney, the names of the purchasers thereof, the amounts received by him on account of the purchase-money, giving the dates of the receipt thereof, and the disposition made by him of the moneys so received.

I reserve further directions until after the filing of the accounts I have directed.

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## MANITOBA.

ROBSON, J. FEBRUARY 20TH, 1912.

CHAMBERS.

### RE ST. BONIFACE BY-LAW.

*Municipal Corporations — By-law — Motion to Quash — Grounds—Inquiry by County Court Judge—St. Boniface City Charter, sec. 521.*

Upon an application to quash a by-law of the City of St. Boniface, an interim order was made, under sec. 521 of the city charter, directing an inquiry by a County Court Judge concerning any probable grounds for the application.

Certain grounds were alleged by the applicant upon information and belief:—

*Held*, that the reason for the inquiry was, that direct proof of the facts might not be otherwise available; and it was sufficient for the purpose that it appeared reasonable to suppose that the inquiry would elicit facts bearing upon probable grounds alleged in support of the application.

Application by one Theophane Bertrand for an order for an inquiry to be made before the County Court Judge of St. Boniface, concerning any probable grounds that might exist for an application to quash by-law No. 800 passed by the Council of the City of St. Boniface. See Re St. Boniface By-law, 19 W. L. R. 943.

The grounds mentioned in the affidavit of the applicant and referred to in the judgment were as follows:—

(b) Because (the by-law) has not received the assent of the legally qualified electors of the city, in accordance with the provisions of the city charter.

(c) That the passing of the by-law has been procured through and by violation of the provisions of the several sections of the city charter.

(d) That several electors, in number sufficient to change the result of the voting, have, as I am informed and verily believe, voted at a poll different from the poll at which they were entitled to vote on the by-law, contrary to the provisions of the city charter.

(e) Because several electors, in numbers sufficient to change the result of the polling, as I am informed and verily believe, voted more than once upon the by-law.

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(f) Because the deputy returning officers of polls numbers 2 and 3 did not, as required by the city charter, immediately after the close of their respective polls, count the ballots cast thereat.

(g) That the total of votes returned is largely in excess of the vote recorded in the poll-book.

(h) That the return of the deputy returning officers for polls numbers 2 and 3 to the returning officer, or the certificates of said returns to the returning officer, are incorrect, and, from inquiries I have made, I verily believe that the thirty-nine electors qualified to vote thereat voted against the by-law in poll No. 2, instead of nine, as certified by the returning officer, and in poll No. 3, at least fifty-five, instead of thirty-one, as certified by the returning officer.

A. Dubuc, for the applicant.

H. P. Blackwood, for the city corporation.

ROBSON, J.:—There is now pending an application by Theophane Bertrand, under sec. 517 of the St. Boniface city charter, to quash by-law No. 800, passed by the council of that city. The city corporation have opposed the application. I am asked by the applicant to direct, under sec. 521 of the charter, that there be an order for an inquiry before the County Court Judge of St. Boniface, concerning any probable grounds that may appear to exist for the motion.

It is objected on behalf of the city corporation that no such grounds have been so far shewn, in that the only material is an affidavit of the applicant as to certain of those grounds, based on information and belief. But the very reason for the investigation is, that direct proof of the facts may not be otherwise available. It is, I think, sufficient for the purpose that it appear reasonable to suppose that the inquiry will elicit facts bearing upon probable grounds alleged in support of the application.

The inquiry will be directed as to all the grounds mentioned in clauses (b), (c), (d), (e), (f), (g), (b), of the applicant's affidavit; but sec. 154 of the charter must be observed—that is to say, no person shall be asked how he voted. See Re Orangeville By-law, 20 O. L. R. 476; Regina v. Saunders, 11 Man. L. R. 563; Re Shoal Lake By-law, 20 Man. L. R. 36, at p. 40.

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The costs of the investigation shall be costs in this proceeding, and the inquiry is ordered, on the applicant's request, only on that condition, to which he will assent by taking the order.

The order will provide as to notice of the inquiry and otherwise as in sec. 521 mentioned.

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## MANITOBA.

ROBSON J. FEBRUARY 20TH, 1912.

TRIAL.

### DONOGH v MOORE.

*Contract—Purchase of Land—Agreement to Share Profits on Sale at Advanced Price—Interest in Land—Partnership—Abandonment—Election—Damages.*

It was agreed between the plaintiff and defendant that the defendant should select a parcel of land which might be bought reasonably and in such a way that there would be allowed off the purchase-price by the vendor a sum for commission to the defendant (who was an estate broker) for effecting the sale; that the plaintiff should furnish the purchase-money, less the sum so to be allowed; that the land should be sold when a profit could be realised; and that the profit should be divided equally between the parties. Land was bought in the manner specified, and the plaintiff paid for it (less the sum allowed the defendant as commission) and obtained a title to it:—

*Held*, that the defendant had no estate or interest in the land, as a partner or otherwise, but simply a right, if and when a sale should be made, to receive one-half of the profit realised. This right would, if the defendant should so elect, on the plaintiff's refusal to sell, on reasonable request, give the defendant an action for damages.

*Held*, also, upon the evidence, that the defendant had not abandoned the contract, or elected to treat it as broken by the plaintiff's refusal to sell when the defendant found a purchaser at an advanced price; and the contract was still subsisting.

Action to remove a caveat registered by the defendant against land standing in the name of the plaintiff. Counterclaim for a declaration of the defendant's interest in the land.

W. H. Trueman and W. Hollands, for the plaintiff.

A. E. Hoskin, K.C., for the defendant.

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ROBSON, J.:—The parties reside in Winnipeg. The plaintiff has carried on business as a merchant tailor, and the defendant, as a real estate broker.

About November, 1901, it was verbally agreed between the plaintiff and defendant that the defendant should select a parcel of land which might be bought reasonably and in such a way that there would be allowed off the purchase-price by the vendor a sum for commission to the defendant for effecting the sale; that the plaintiff should furnish the purchase-money, less the sum so to be allowed; that the land should be sold when a profit could be realised, and the profit divided equally between the parties. Pursuant to this arrangement, the defendant brought to the attention of the plaintiff the land now in question; and, in the result, a formal agreement was entered into between the owner and the plaintiff, whereby the former agreed to sell to the latter for $1,440. The down payment was $360, which was satisfied by payment of $288 by the plaintiff to the owner and the set-off of $72, which may be called the defendant's commission.

The plaintiff contends that the defendant was to procure a purchaser at a profit within a year; that his so doing was essential to his sharing in the profit; that such was not done; and that, consequently, the plaintiff had to make the future payments, as he in fact did. The plaintiff contended that the defendant thus lost any rights he may have had. The defendant denies this alleged stipulation. This question became unimportant, as it was made clear by the evidence of the witness Lundy that the defendant had, within the year, produced an intending purchaser at an advanced price, and that the plaintiff declined to deal with him. The plaintiff did not repudiate or deny the arrangement with the defendant. He merely thought it unwise to sell at the price offered. According to the defendant, there were further offers procured by him, each one being an advance over the previous one. This is denied by the plaintiff. Whether there was or was not any subsequent effort by the defendant to find a purchaser is material only on the question whether he abandoned his bargain with the plaintiff. I cannot find any such abandonment. The defendant did not treat the plaintiff's refusal to accept Lundy's offer, or the refusal to accept any alleged subsequent offer, as a breach of contract entitling him to damages, but permitted matters between

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him and the plaintiff to stand, regardless of any refusal. That the defendant was not bound to treat the plaintiff's conduct in any such instance as a breach, is quite clear. He was at liberty to elect "either to treat the declaration as brutum fulmen, and, holding fast to the contract, to wait till the time for its performance had arrived, or to act upon it, and treat it as a final assertion by the promisor that he is no longer bound by the contract, and a wrongful renunciation of the contractual relation into which he has entered. But such a declaration only becomes a wrongful act if the promisee elects to treat it as such. If he does so elect, it becomes a breach of contract, and he can recover upon it as such." See per Bowen, L.J., in Johnstone v. Milling, 16 Q. B. D. 460, at p. 473, cited with other authorities to the like effect by Killam, C.J., in McCowan v. McKay, 13 Man. L. R. 590. Had the defendant made an election in a binding manner (13 Man. L. R. at p. 596) to treat the plaintiff's refusal as a breach, his cause of action might date from the breach, and the period of limitation of an action of damages would become important, but there was no such election. In my view, therefore, the contract still stands; and the only question is, what is the position of the parties thereunder?

The defendant asserts that he has an estate or interest in the land in question; and, the title being in the name of the plaintiff, he, the defendant, filed a caveat. The plaintiff seeks the removal of that caveat. This would involve an adjudication that the defendant has no such estate or interest. In my view, the defendant has no estate or interest in the land, but has simply a right, when it is sold, to receive one-half of the profits realised.

That the purchase-price to the plaintiff was reduced by $72 was, together with the defendant's offer to find a suitable parcel of land, the consideration for the plaintiff's agreement to give the defendant one-half of the profits on a sale. There was clearly no partnership. Had there been a loss, the defendant would not have been liable to share it. The defendant had merely an unconditional right to share in the profit realised on a sale. This right would, if the defendant should so elect, on the plaintiff's refusal to sell, on reasonable request, give the defendant an action of damages. That this is the present position of the parties, notwithstanding anything that has elapsed, seems unquestionable.

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In Smith v. Watson, 3 B. & C. 401, Bayley, J., said, at p. 407: "Now a right to share in the profits of a particular adventure may have the effect of rendering a person liable to third persons as a partner, in respect of transactions arising out of the particular adventure in the profits of which he is to participate; but it does not give him any interest in the property itself, which was the subject-matter of the adventure." See also Meyer v. Sharp, 5 Taunt. 741. Stuart v. Mott, 23 S. C. R. 387, also shews the distinction between a right of sharing in proceeds and property in the subject-matter.

There will be judgment setting aside the caveat and declaring: (1) that the defendant has no estate or interest in the lands in question; and (2) that the defendant, under the contract so found, has a right to receive one-half of any profits which may be derived from any sale of the lands that may be effected either by the plaintiff himself or by the aid of the defendant. Otherwise the claim and counterclaim are dismissed.

I will hear counsel on the question of costs.

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## MANITOBA.

ROBSON, J. FEBRUARY 21ST, 1912.

CHAMBERS.

## RE WINNIPEG HEDGE AND WIRE FENCE CO.

## WALLACE'S CASE.

*Company—Winding-up — Contributory — Shares Issued as Paid-up—Absence of Real Consideration—Liability of Holder—Right of Liquidator to Question Transaction—Liability in Respect of Shares Transferred—Winding-up Act, sec. 123—"Trustee for Syndicate"—Manitoba Companies Act, sec. 48—Transfer of Shares to Company—Set-off—Price of Patent Said to be Sold to Company.*

**In a proceeding under the Dominion Winding-up Act for the winding-up of a trading company incorporated under the Manitoba Act, W. was *held* liable as a contributory in respect of 200 shares issued to him as paid-up, but for which the company had, on the evidence, received no consideration.**

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W. was *held* not liable in respect of 10 shares which he had formally transferred to R. after they had been issued to him as paid-up.

*In re Wiarton Beet Sugar Co., Freeman's Case*, 12 O. L. R. 149, followed.

Liability under sec. 123 of the Winding-up Act was not suggested; and, *semble*, that section cannot be invoked on an application to settle a list of contributories.

The "trustee" protected by sec. 48 of the Manitoba Act is one who represents an estate. As regarded the company, W. was, for all purposes, the shareholder: the words "trustee for syndicate" merely ear-marked the shares.

A transfer of 117 of the shares by W. to the company was entirely ineffectual.

*Smith* v. *Gowganda Mines Limited*, 44 S. C. R. 621, followed.

A plea of set-off of $10,000, supposed to be the price of a patent sold by W. and his associates to the company, could not be maintained.

*Re Jones and Moore Electric Co.*, 18 Man. L. R. 549, 571, followed.

The liquidator had a right to question the transactions between W. and his associates and the company, of which they were in control.

Application by the liquidator, in a winding-up proceeding under the Dominion Act, to place the name of B. D. Wallace on the list of contributories.

W. J. Cooper, K.C., and J. W. E. Armstrong, for the liquidator.

A. Haggart, K.C., for Wallace.

ROBSON, J.:—This company is in course of winding-up under the Winding-up Act, Dominion.

B. D. Wallace was, on the application of the liquidator, called upon to shew cause why his name should not be settled on the list of contributories in respect of two allotments of 10 and 200 shares respectively, the nominal value of each share being $100.

The company was incorporated by letters patent, granted by the Lieutenant-Governor of this province on the 24th March, 1902.

In or prior to January, 1902, being before the incorporation of the company, Wallace and certain other gentlemen, who are referred to as "the syndicate," agreed to purchase, from the Stratford Hedge Fence Company Limited, the right, in respect of a certain portion of Manitoba, to the benefit of a patent issued by the Government of Canada for improvements in hedge fences. The price was to be $10,000. A formal agreement expressing this transaction was filed. It is said that this sum was subsequently paid; and apparently that fact cannot be questioned. It was contemplated that a

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company should be formed, and that the rights so acquired should be assigned by Wallace et al. to that company, at a price to be agreed on. The present company was subsequently formed. The members of the syndicate were the sole incorporators, and became the first directors of the company.

The petition for incorporation sets forth that the applicants, of whom Wallace was one, had each subscribed for $1,000 of the capital stock (being 10 shares of $100), and had paid the amount in cash. With the petition was filed a declaration by Wallace that the facts alleged in it were, to the best of his knowledge and belief, true and correct. In fact, the sums subscribed were not so paid. The explanation is, that the amount paid for the patent right, amounting to $10,000, constitutes the $10,000 in the petition stated to have been paid.

There is no indication of the company's acceptance of the patent right in satisfaction of the $10,000 subscribed by the original applicants, supposing that to have been within its powers.

In the minute-book of the company is inserted a memorandum purporting to be a record of a resolution of the shareholders of the company of the 14th December, 1903, authorising the preparation of an agreement whereby the members of the syndicate should assign the patent right to the company for $20,000 of the capital stock of the company.

There is no other written indication of there having been a meeting of the company on the 14th December, 1903, than the memorandum above mentioned. It is very doubtful whether there was such a meeting. The resolution also provided that the syndicate were to be allowed shares, to the amount of $10,000, as remuneration for their expenses and outlay in connection with the promotion of the company, together with the costs of selling capital stock and nursery stock and other expenses up to that date. The agreement was to be prepared before the date of the annual meeting on the 30th December, 1903, and it was to date back to the 7th January, 1902.

A formal document, apparently in execution of this intention, was signed by nine of the ten members of the syndicate. The resolution and the document merely shew what the syndicate desired. As it was to be read as of date before incorporation, it had no effect on the company.

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In a treasurer's statement, dated the 30th December, 1903, the "assets" contain an item, "Patent, $20,000." That statement was adopted, but that is not, to my mind, to be taken as sufficient evidence of a contract by the company to take over the patent right at $20,000—if it is any evidence at all of any such undertaking.

It does not appear that there was, at the meeting of the 30th December, 1903, any attempt to procure the company to enter into any arrangement such as was in that resolution foreshadowed.

The syndicate themselves carried on the enterprise till August, 1904, and perhaps later. Before that month, it had been the experience of those here concerned that the invention was not likely to prove successful in this country.

On the 3rd August, 1904, by-law No. 8 of the company was passed, whereby it was enacted that the company enter into an agreement with Wallace and associates for the purchase of the patent right and for the repayment to them of all expenses of every kind incurred by them in the interest of the company and for the purchase of all assets belonging to them, the purchase to be made by the transfer to Wallace of 300 shares of paid-up stock.

There was produced a document purporting to be articles of agreement, dated October, 1904, between the company and the syndicate, drawn apparently in pursuance of by-law No. 8. By this it was provided that the patent rights be assigned to the company, in consideration of 300 paid-up shares, i.e., $30,000. This document was signed by seven members of the syndicate, and by a person who had succeeded one of them. Thus the signatures of two members were lacking. The document is sealed with the company's seal, and signed by its secretary as such, but not by the president or other officer.

There is no satisfactory evidence that there was at any time a formal assignment of the patent rights to the company.

While the supposed resolution of the 14th December, 1903, would lead one to think that it was then in the minds of the parties that $20,000 stock was to be issued for the patent rights and $10,000 for the outlays, the viva voce evidence would indicate that the patent was to be paid for by the $10,000 originally subscribed in the application for charter, and that the $20,000 was for outlays, etc.

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On the 23rd November, 1904, there was issued to Wallace a certificate for ten shares, i.e., $1,000, and a certificate to him for the syndicate for 200 shares, i.e., $20,000. I take it that this $1,000 was his one-tenth of the original $10,000; that a similar issue was made to each of his associates; and that he received the $20,000 certificate for the syndicate's alleged outlays, thus making the $30,000 mentioned in by-law No. 8. Ten shares of the 200 were transferred by Wallace to W. P. Rundle, on the date of the certificate; and on the 26th November, 1904, a new certificate was issued to Wallace for 190 shares.

Matters came to such a pass that, at a meeting on the 16th February, 1907, the company's officers were instructed to request the return for cancellation of such of the 200 shares as had not been sold or transferred, with such notes as had been taken for shares sold.

Nothing seems to have been done, however, till the 2nd September, 1908, when, at a meeting, the opinion was again expressed that the unsold balance of the $20,000 stock, which was supposed to be $12,600, should be re-assigned to the company, and the officers were authorised to request the return from members of the syndicate of shares in all $19,600, though a total of $20,000 was expressed.

On the 2nd November, 1908, a transfer of 117 of the shares to the company was signed by Wallace. That this was entirely ineffectual, see Smith v. Gowganda Mines Limited, 44 S. C. R. 621.

The inference is, that the issue to Wallace of the certificates of 10 and 200 shares respectively, with the nine like issues of 10 shares to the others, made up the 300 shares mentioned in by-law No. 8. This being so, strictly speaking it leaves the original subscription without any pretence of payment. But I am, in his favour, imputing the certificate of 10 shares to the original subscription.

On these recited facts, can it be said that the shareholder's liability upon these shares has been satisfied?

As has been stated, I cannot find that there has been an assignment of the patent. From the evidence before me, it did not appear that there had been such an assumption or user of these patent rights by the company that an obligation to pay for it in any manner could be implied against the company. If the company got anything at all for the original subscription, it was merely a verbal undertaking to assign

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the patent, though there is no record of the company having received even that.

A plea of set-off of the $10,000, supposing that to be the price of the patent, obviously could not be maintained. The language of Howell, C.J.A., in Re Jones and Moore Electric Co., 18 Man. L. R. 549, at the top of p. 571, fits the case exactly.

But, treating the transaction as if the whole 300 shares of the company were being dealt with by by-law No. 8, which was the first corporate action regarding the patent, and the supposed outlays, the agreement prepared to carry that out was not executed. Under the circumstances of this company, with the syndicate managing it, I am not disposed to infer from the mere issue of the certificate that the execution had been dispensed with, and that the transfer of the patent under the agreement had been made. Suggestions of the loss of papers do not help the matter.

As to the considerations, apart from the patent, for the issue of 300 shares, no very definite statement was forthcoming at the hearing. It was expected that a good deal should be taken for granted. A shareholder who has got his shares in some method other than by the payment of cash ought to be ready when called on to shew that consideration passed to the company.

The statement given by Wallace himself as to this consideration must be examined. It was put under four heads.

First, it appears, as above remarked, that until the stock issued in 1904 the syndicate carried on the venture themselves. The amount spent by the syndicate in that connection in the years 1902, 1903, and 1904, is part of the consideration for the 200 shares. But that there ever was a liability on the company to assume that amount has not been disclosed to me.

Second, the consideration included the nursery stock the syndicate had on hand.

Third, certain orders for work or materials, which orders the syndicate had on hand.

Fourth, a lease of a piece of land which had been planted out, and on which some small buildings had been erected.

No details of any of these items are given, but it was said that, with interest, they represented about $20,000, which statement I cannot credit. I am given no idea of what the stock was worth or what it cost to get the orders

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mentioned, nor is there the slightest hint as to the value of the lease. Some figures were given, and the best I can make of them is, that the syndicate (apart from the cost of the patent) spent about $3,750, but how much of that the company either expressly or impliedly assumed I know not. Then, as already said, before by-law No. 8 was passed, the patent had been demonstrated to be of no value to the company. The transaction as to that feature can only be dealt with as of that date; and it seems that the $10,000 stock issued for the patent was, as I must also hold the rest of the consideration for the 300 shares, illusory; and I add that the procuring of such an issue, for considerations grossly inadequate, was a fraud on the company.

There can be no doubt as to the liquidator's right to question the transaction. The position of the liquidator here is, as to the 10 shares, stronger than that of the liquidator in Re Jones and Moore Electric Co. Here there was no completed transaction as to the patent. The contributory simply fails in proving consideration for the 10 shares. As to the other alleged considerations, the case is in line with Re Jones and Moore Electric Co., and the liquidator's position is the same.

The certificate for the 200 shares is to "B. D. Wallace, trustee for syndicate."

The personal liability of a certain class of trustees is excluded by sec. 48 of the Manitoba Act; but a perusal of that section shews that the trustee protected is one who represents an estate. I do not think Wallace is protected by that section. The words "trustee for syndicate" merely earmark the shares. As regards the company, Wallace is, for all purposes, the shareholder. The persons to whom he may be accountable would have no status in the company. The subject is dealt with in Masten's Company Law, p. 136. Moreover, Wallace was a member of the syndicate, and so beneficially interested. His name could not be struck off on this ground. Possibly he would have the right to have the others added jointly with him; but that is another matter.

No stock book or register of shares was produced. While it was said that there have been dealings with the 200 shares beyond the transfer of 10 to Rundle, there does not appear to have been any formal transfer; and, from the evidence adduced, Wallace must be considered a shareholder for 190 of the 200 shares. Having made the transfer of the 10, he

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cannot be held liable as a shareholder in respect of them: see In re Wiarton Beet Sugar Co., Freeman's Case, 12 O. L. R. 149. Liability in this proceeding, under sec. 123 of the Winding-up Act, has not been suggested. It does not seem to me that that section can be invoked on an application to settle a list of contributories.

In the result, the name of the contributory, B. D. Wallace, must remain on the list in respect of the 10 shares and in respect of 190 of the 200 shares; and the list will be varied accordingly. He must pay the liquidator's costs of this proceeding.

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## MANITOBA.

PRENDERGAST, J. FEBRUARY 22ND, 1912.

TRIAL.

### MANSFIELD v. TORONTO GENERAL TRUSTS CORPORATION.

*Vendor and Purchaser—Contract for Sale of Land—Correspondence—Statute of Frauds—Formal Offer — Inability of Vendors to Convey—Specific Performance Refused — Amendment—Damages — Successful Parties Ordered to Pay Costs.*

In a purchaser's action for specific performance of an alleged contract for the sale and purchase of land, it was *held*, that a contract was made by correspondence between the parties, meeting the requirements of the Statute of Frauds, and that a formal written offer by the plaintiff, not formally accepted by the defendants, was not part of the real contract; but specific performance was refused, because the defendants had no power, as executors of a testator who held the land in trust, to convey it.

Leave to amend by setting up a claim for damages was applied for at the close of the trial, but refused, because the defendants were not prepared to meet the claim, having had no notice of it.

The action was dismissed, but the defendants were ordered to pay the plaintiff's costs, because they had not set up in their statement of defence the ground upon which they succeeded, and because it appeared that the only reason why they did not make an honest effort to carry out the agreement was, that the land was rapidly increasing in value.

Action by the purchaser for specific performance of an agreement for sale of land.

H. F. Maulson, for the plaintiff.

A. E. Hoskin, K.C., for the defendants.

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PRENDERGAST, J.:—The plaintiff's contention is, that certain letters which were exchanged between the parties constitute a complete agreement of purchase and sale. The defendants, on the other hand, contend that it was made by them an essential part of the agreement or negotiations leading to the agreement that the plaintiff should make his offer according to a special printed form, and that the same, if so made, was never accepted.

I find that, when the defendants first made mention of an "offer form," which was in their letter of the 21st July, the only conditions of sale not yet agreed upon in the correspondence carried on till then, were as to commission, as to hay grown that year, and as to what form of title the plaintiff would accept, and what costs the defendants would bear in perfecting the same.

Now, all those matters were agreed upon in subsequent correspondence, which—assuming for the moment the "offer form" not to be an essential or necessary part in the negotiations—fully meets, in my opinion, the requirements of the Statute of Frauds.

As to the formal offer, it does not go, and was not intended to go, beyond what was already agreed; it says nothing of commission or hay; and with respect to title and cost of the same, the printed clause therein is not as favourable to the defendants as the condition set out in their letter above referred to, and accepted by the plaintiff, namely: "provided the purchaser will accept transfer from the corporation as executors and trustees, the only expense to be borne by the estate being the proving or resealing of the will in Manitoba."

I hold, on those grounds, that the so-called "formal offer" was not really the offer in the transaction, that is, was only required by the defendants as a matter of convenience and uniformity in the keeping of their sale records; that the parties intended to be bound in the usual way by their correspondence, irrespective of such offer; and that the agreement was completed by Mr. Maulson mailing his letter of the 28th July to the defendants.

I hold, however, that specific performance is not in order here, as the defendants, in my opinion, have no power to convey. I do not think that the will under which Thomas Robertson appointed the defendants executors and trustees



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of his individual property, has the effect of making them executors and trustees with power to convey as to the property in question, which he (the testator) himself held in trust.

Nor do I think that I should entertain the plaintiff's application, made at the close of the argument, to be allowed to amend so as to include in his prayer a claim for damages. The defendants were not prepared to meet that without notice.

I will then dismiss the action. But, as the only ground on which I do so is not set out in the statement of defence, and it also appears that the only reason why an honest effort was not made to carry out the agreement was, simply, that the land is rapidly increasing in value, the plaintiff will have his costs of suit.

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## MANITOBA.

FEBRUARY 22ND, 1912.

COURT OF APPEAL.

### TIMMONS v. BROWN.

*Appeal—Consent Judgment—Right of Appeal.*

**An appeal from a consent judgment will not be entertained.**

**The judgment in this case, in the circumstances set out below, was considered a consent judgment.**

The plaintiff brought this action in the Winnipeg County Court to recover $500, which he claimed as commission for having effected a sale of the King Edward Hotel at Winnipeg Beach.

DAWSON, C.Co.J., before whom the action was tried, entered a verdict for the plaintiff as follows: "Leave to plaintiff to add count for 'work done and services performed.' Verdict for plaintiff for $50 without costs, defendant consenting."

The plaintiff appealed, asking to be allowed the full amount of the commission as claimed in the action.

The appeal was heard by HOWELL, C.J.M., RICHARDS, PERDUE, and CAMERON, JJ.A.

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A. Haggart, K.C., for the defendant, took the preliminary objection that no appeal would lie, as the judgment was a consent one: Bicknell & Seager's Division Courts Act, p. 298.

B. L. Deacon, for the plaintiff, contended that the consent given by the plaintiff, if any, must appear on the record: Sun Life Assurance Co. v. Elliott, 31 S. C. R. 91; Aldam v. Brown, 89 L. T. Jour. 116; Re Justin, 18 P. R. 125; Holmested & Langton's Jud. Act, p. 124; Snow's Annual Practice, 1912, vol. 2, p. 62.

THE COURT allowed the preliminary objection, and dismissed the appeal, holding that, according to the entry on the record and the fact that counsel for the plaintiff was present when it was made, and took the benefit of it, the judgment must be considered to have been a consent judgment, and, therefore, not appealable.

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## MANITOBA.

ROBSON, J. FEBRUARY 23RD, 1912.

SINGLE COURT.

## COOPER v. ANDERSON.

*Vendor and Purchaser—Contract for Sale of Land—Agreement with Registered Owner as Vendor—Notice of Adverse Claim of Title before Completion of Purchase—Real Property Act, secs. 71, 91—Pleading—Power of Attorney—Estoppel—Judgment on Admissions—Rules 615, 616.*

In his statement of claim, the plaintiff alleged that, as security for a debt, the defendant A. transferred land to him, the plaintiff, and that he received a certificate of title therefor; that afterwards he gave the defendant A. a power of attorney; that the defendant A. and the defendant W. conspired to have the land transferred to W. in trust for A., and a certificate of title issued to W.; that afterwards, W., in furtherance of the fraud, transferred the land to the defendant trust company as trustee for A., and the trust company were registered as owners; that the defendant investment company filed a caveat against the land, claiming to have purchased under an agreement from the trust company. The plaintiff's claim was, that the transfers be set aside and the certificate of title cancelled, and for a declaration that the plaintiff was entitled to be registered as owner, subject to any rights the investment company might be declared to have. Upon an application by the defendant investment company to vacate the registry of a certificate of *lis pendens*—treated as an application for judgment upon admissions under Rule

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**615—the plaintiff contended that the investment company's agreement was, by notice of the plaintiff's rights before completion, subject thereto, and that, if the plaintiff should succeed, the agreement between the two companies would fall, with a possible right to the investment company to a lien on the land for the amount they had paid:—**

***Held*, that secs. 71 and 91 of the Real Property Act conclusively established the right of the investment company. Section 91 means that an innocent person may safely contract or deal with a registered owner without inquiry. The contract is protected throughout, from its inception to its determination. On the facts admitted in the pleadings, the rights of the investment company, under their contract with the trust company, were not affected by the claims of the plaintiff, as set out in the statement of claim.**

***Semble*, also, that the statement of claim itself shewed an estoppel against the plaintiff in favour of the investment company, by reason of the power of attorney.**

**And *held*, that the investment company were entitled, under Rule 615 or 616, to a judgment dismissing the action as against them with costs.**

Application by the defendants the Trust Investment Company for an order vacating the registry of a certificate of lis pendens, in an action to establish an interest in land in Winnipeg. The defendants were: John Herbert Anderson, Walter Wickson, the Trusts and Guarantee Company, Annie Anderson, Agnes Anderson, and the Trust Investment Company.

E. R. Levinson, for the applicants.

W. M. Crichton and E. A. Cohen, for the plaintiff.

A. K. Dysart, for the defendants the Andersons.

A. C. Galt, K.C., for the defendants the Trusts and Guarantee Company.

H. F. Swift, for the defendant Wickson.

ROBSON, J.:—It was agreed by all parties that I should consider the pleadings and make such order thereupon as might seem proper, in view of the contentions of the parties now to be mentioned.

The pleadings are lengthy. I will endeavour to epitomise them.

In his statement of claim the plaintiff alleges that, as security for a debt from the defendant J. H. Anderson to him, the land was transferred to the plaintiff, and that he, the plaintiff, received a certificate of title about the 30th December, 1902; that on the 28th April, 1905, the plaintiff granted to Anderson a power of attorney; that about the 13th November, 1907, a conspiracy was formed between Anderson and the defendant Wickson to transfer the lands

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to Wickson in trust for Anderson, and that a certificate of title issued to Wickson on the 13th November, 1907; that on the 31st January, 1910, Wickson, at the request of Anderson, in furtherance of the fraud, transferred the land to the Trusts and Guarantee Company as trustees for Anderson; and that on the 4th April, 1910, that company were registered as owners in fee simple in possession, though in fact they hold the land in trust for the defendants Anderson, the defendants Annie Anderson and Agnes Anderson taking their supposed shares as a gift from J. H. Anderson; that the defendants the Trust Investment Company filed a caveat against the lands, claiming to have purchased under an agreement from the Trusts and Guarantee Company. The charges of fraud are set forth very fully and with alternative aspects. The plaintiff claims that the transfer be set aside and the certificate of title cancelled, and a declaration that the plaintiff is entitled to be registered as owner, subject to any rights the Trust Investment Company may be declared by the Court to have. There are also demands for other relief not now important.

It will be observed that the Trust Investment Company are not involved in the charges made against the other defendants. Those defendants do not question the position of the Trust Investment Company. The only allegation by the plaintiff affecting that company is, that they filed a caveat as purchasers under an agreement from the Trusts and Guarantee Company.

The prayer asks that the certificate of title be set aside. With it the caveat would go too, so the Trust Investment Company are concerned in the relief claimed, though no facts are alleged making out a cause of action against them. The statement of claim seems to assume that, if the plaintiff's allegations as to the other defendants were made out, the Trust Investment Company's agreement would necessarily cease to affect the land. The indefinite acknowledgment in the prayer of possible rights of that company was made, I infer from the argument, in the expectation that the company might be allowed a lien for moneys paid by them under their agreement.

In their statement of defence, which was repeated in reply to the amended statement of claim, the Trust Investment Company say that they purchased the land from the Trusts and Guarantee Company under agreement in writing;

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dated the 27th March, 1911, for the price of $55,000, of which $18, 334 was paid in cash, the balance being payable in three instalments; that, at the time of the execution of the agreement and registration of the caveat in question the title to the land was in the Trusts and Guarantee Company, as shewn by a certificate of title under the Real Property Act, subject to no incumbrances save a mortgage not now in question; that the company made all proper inquiries and were unaware of any interest save as shewn by the register.

It is alleged that notice of assignment by the Trusts and Guarantee Company to another party of the Trust Investment Company's covenants in the agreement has been received by the latter.

The plaintiff's reply to the original statement of defence of the company was treated as applying to the defence to the amended statement of claim.

By that reply, all the allegations of the Trust Investment Company are admitted. The words are added, "The plaintiff admits that the purchase of the said lands as aforesaid was made by the said defendants innocently and in good faith."

There is thus said to be raised on the pleadings, without any specific issue of fact concerning it, the question whether the Trusts Investment Company are affected by notice, received by means of this action, of the fraud described, supposing such to have existed. It is contended by the plaintiff that the Trust Investment Company's agreement is, by notice of the plaintiff's rights before completion, subject thereto, and that, if the plaintiff succeeds, the agreement will fall, with a possible right to the purchaser to a lien on the property for the $18,334 paid.

The Trust Investment Company, in short, say that they relied on the certificate of title; that they are in no way concerned with the troubles of the other parties, and should not be harrassed thereby; and that they should be dismissed from this action with their agreement unimpaired.

The plaintiff's counsel contended that the contract was not completed, and cited English cases to shew that notice to an intending purchaser, before completion, that equities existed in favour of third parties, was sufficient to intercept the contract, and prevent the intending purchaser from acquiring title. Tourville v. Naish, 3 P. Wms. 307, was

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referred to. Other cases are mentioned in the notes thereto, one being Wigg v. Wigg, 1 Atk. 382, where Lord Chancellor Hardwicke is reported to have said that, though a purchaser did not know of an incumbrance before he paid his money, yet, as he knew it before the deed was executed, it affected him with notice. To meet the idea that, by virtue of the vendor and purchaser agreement, the purchaser was to be taken to be the beneficial owner and the vendor a trustee, authorities were cited to shew that such trusteeship is but a qualified one, and does not affect strangers.

This argument is fraught with great possibilities. Carried to its legitimate extent, it means that, even after payment of the purchase-money, perhaps to assignees, and up to the time of the registration of a transfer to them, the agreement held by the Trust Investment Company may, simply by notice of the supposed equity of the plaintiff, be subject to be defeated thereby. That such a result is possible, at all events where the Real Property Act is involved, is difficult, I must acknowledge, for me to imagine. That many large transactions have no stronger foundation need hardly be said. In many cases, contracts have been made for sales again, in reliance on such agreements with the registered owner, supported by the usual caveat.

Section 71 of the Real Property Act declares the effect of the certificate of title as conclusive evidence that the person named therein is entitled to the land for the estate or interest specified.

Section 91 reads as follows: "91. Except in the case of fraud on the part of such person, no person contracting or dealing with, or taking or proposing to take an instrument from, a registered owner, shall be required or in any manner concerned to inquire into or ascertain the circumstances under, or the consideration for, which such owner or any previous owner is or was registered, or to see to the application of the purchase-money or of any part thereof; nor shall any person be affected by notice, direct, implied, or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any trust or unregistered interest is in existence shall not of itself be imputed as fraud."

Section 130 declares that any person claiming an estate or interest in land under the new system may file a caveat, etc.

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Section 143 says that registration by way of caveat shall have the same effect as to priority as the registration of any instrument under the Act.

It seems to me that secs. 71 and 91 of the Act conclusively establish the right of the Trust Investment Company. Section 91 means nothing if it does not mean that an innocent person may safely contract or deal with a registered owner without inquiry. It certainly cannot mean that, though he need not inquire at the time of innocently contracting, yet, if he gets the notice later and before completion, his contract shall be affected, possibly nullified, thereby. In short, I take it that the contract is protected throughout, from its inception to its termination, by completion or otherwise. If the Act were meant to protect only such transactions as are specifically dealt with in the Act, e.g., actual transfers, mortgages, incumbrances, and leases, the words "contracting or dealing with" would not be merely surplusage, but would be misleading.

I am prepared to hold that, on the facts admitted in the pleadings, the rights of the Trust Investment Company, under their contract with the Trusts and Guarantee Company, are not affected by the claims of the plaintiff, as set out in the statement of claim.

Aside from all this, it seems to me that the statement of claim itself shews an estoppel against the plaintiff in favour of these defendants, as the plaintiff gave Anderson the power of attorney whereby Wickson and the Trusts and Guarantee Company were eventually held out as owners.

In view of the agreement between the parties that I should make such order as upon the pleadings should seem proper with reference to the defendants the Trust Investment Company, the matter is virtually being dealt with as an application for judgment upon admissions under Rule 615. The position of this defendant is distinct and severable from those of the other defendants. The Rule says it shall not be necessary to wait for the determination of any other question between the parties, which, I take it, means all or any of the parties. It would be an injustice to keep the Trust Investment Company's position in suspense until the termination of what promises to be a tedious litigation. This Rule may be applied where the judgment would be final and not merely interlocutory: In re Barker's Estate, 10 Ch. D. 162, at p. 165; Holmested & Langton's Jud. Act, 3rd ed., p. 817.

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The case might, as to these defendants, be likewise dealt with under Rule 616.

An order will go directing the entry of judgment dismissing the plaintiff's action as against the Trust Investment Company with costs. Those defendants may be quite willing to avoid further connection with the litigation, and may, should they so desire, withdraw their counterclaim without costs.

As to the other defendants, the costs of this motion will be costs to them in the cause.

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## MANITOBA.

ROBSON, J. FEBRUARY 26TH, 1912.

CHAMBERS.

### SMITH v. ERNST.

*Service out of the Jurisdiction—Statement of Claim—Parties —Rule 201 (g)—Specific Performance.*

**The defendant E., a citizen of the United States of America, agreed to sell land in Ontario to the plaintiff. The agreement was made in Manitoba, wherein E. then resided. E. afterwards assigned all his interest in and title to the land and in the agreement to the defendant J., and went to reside in the State of Minnesota, where he was served, under an order of the Referee in Chambers, with notice of the statement of claim in an action, against himself, J., and another, for specific performance of the agreement. J. was served in Manitoba:—**

***Held*, affirming the order of the Referee refusing to set aside the service on E., that the action was properly brought against J., and E. was a proper party to the action; and, therefore, service on E. out of the jurisdiction was authorised by Rule 201 (*g*).**

Appeal by the defendant Ernst from an order of the Referee in Chambers refusing to set aside service of notice of the statement of claim on the appellant out of the jurisdiction.

F. J. Sutton, for the appellant.

W. H. Trueman, for the plaintiff.

ROBSON, J.:—This action is for specific performance of an agreement by the defendant Ernst to sell to the plaintiff certain lands in Ontario. The agreement was evidently made

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in Winnipeg, at a time when the defendant Ernst resided there. The purchase-money is made payable at Winnipeg. The defendant Ernst is a citizen of and now resides in the United States of America. The statement of claim was served on him in the city of St. Paul. The other defendants reside in Winnipeg and have appeared in this action.

The statement of claim contains an allegation that Ernst assigned all his title to the lands and in the agreement to the defendant Just or the defendants the Canadian German Realty Company Limited. The defendant Just admits a conveyance to him by Ernst and an assignment of the moneys payable by the plaintiff to Ernst. So there is no question of notice to Just of the plaintiff's rights.

In his affidavit filed in support of this application Ernst says: "8. That I have at the present time no interest whatever in the said lands, the same having been conveyed by me to the defendant Just in or about the month of May, A.D. 1908."

The defendant Just is, upon these facts, prima facie liable to the plaintiff, at all events to the extent of the estate which he received, to carry out the agreement. The action is, therefore, properly brought against him. Ernst, being the original contractor with the plaintiff, is certainly a proper party to the action.

Rule 201 says that a statement of claim may be served out of the jurisdiction whenever . . . (g) any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.

The English authorities mentioned in the Annual Practice, 1912, p. 95, would support this service ex juris.

I think the learned Referee was right, and dismiss the appeal with costs.

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## BRITISH COLUMBIA.

FEBRUARY 16TH, 1912.

COURT OF APPEAL.

## RE TIDERINGTON.

*Appeal — Court of Appeal — Jurisdiction — Discharge of Prisoner upon Habeas Corpus—Criminal Cause or Matter —Extradition—Constitutional Law.*

The Court of Appeal has no jurisdiction to entertain an appeal from an order of a Judge, upon *habeas corpus*, discharging a prisoner from custody in a criminal cause or matter; and a proceeding under the Extradition Act is a criminal cause or matter.

*Cox* v. *Hakes*, 15 App. Cas. 526, and *Ex p. Woodhall*, 20 Q. B. D. 832, specially referred to.

While there is no provision in the Court of Appeal Act that there shall be no appeal in any criminal cause or matter, such a provision is not necessary to exclude such an appeal, because the Province has no jurisdiction to legislate in such a matter at all.

Appeal by the State of Washington from an order of HUNTER, C.J.B.C., upon habeas corpus, discharging one Tiderington from custody under a commitment for extradition.

The appeal was heard by MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Bodwell, K.C., for the appellant.

Lowe, for the prisoner.

MACDONALD, C.J.A.:—Archibald Tiderington was committed by His Honour Judge Lampman, sitting as an Extradition Commissioner, for extradition to the State of Washington on a charge of embezzlement. An application was made to Gregory, J., for a writ of habeas corpus to discharge the prisoner from custody. This was refused, and a second application was made to Hunter, C.J., and granted, and the prisoner was accordingly discharged. This is an appeal from the said order, by the prosecution. The grounds of appeal relied upon are, that the application for a writ having been refused by Gregory, J., no order for discharge could be made by any other Judge of the same Court, and that on the merits the order complained of should not have been made.

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The jurisdiction of this Court to entertain an appeal was raised, and after argument we took time to consider. I have come to the conclusion that the preliminary objection must be sustained. Up to the time of the passing of the Judicature Acts in England, it is quite clear that there was no appeal from an order made in habeas corpus proceedings remanding or discharging the person detained. The applicant for a writ of habeas corpus could apply to a Judge of any Court, and, if refused, to the Court itself, and if there refused, then to a Judge of another Court, or to that Court itself, and so on successively. But such applications were not regarded as appeals but as original applications. After the Judicature Act (1873) the question arose as to whether or not the section giving jurisdiction to the Court of Appeal, and which provided that an appeal might be taken from all judgments, orders, and decrees of the High Court to the Court of Appeal, was wide enough to include an appeal in habeas corpus proceedings.

The question came before the House of Lords in Cox v. Hakes, 15 App. Cas. 526. In that case the application for the writ was granted by the lower Court, and the person detained was discharged from custody. The majority of their Lordships held that in such a case no appeal was intended by Parliament. As I read the case, their Lordships, while conceding that the general words of sec. 19 of the Judicature Act were wide enough to give an appeal, yet thought Parliament did not intend to prejudice the liberty of the subject by giving an appeal against his discharge from custody; that, if it had been intended to do this, Parliament would have used express words; and in arriving at this conclusion they were much influenced by the consideration that no machinery was provided in the Judicature Act for effectually dealing with the case where the person who had been detained could not be brought before the Court, and could not be remanded to custody by the appellate Court.

Mr. Bodwell pointed out that in the case of Barnardo v. Ford, [1892] A. C. 326. the House of Lords appear to have come to a contrary conclusion, but that was a different case. In that case their Lordships decided the question which they refrained from deciding in the earlier case of Cox v. Hakes. supra. In the Barnardo case they decided that where the writ of habeas corpus was refused, an appeal would lie. That would be in favour of the liberty of the subject, and in

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such a case the Court of Appeal could effectuate its judgment, the detained person being still in custody.

Mr. Bodwell also referred us to In re Hall, 8 A. R. 135, which was an extradition case in the province of Ontario, in which the Court of Appeal entertained an appeal from an order remanding the accused person to custody. That case is based entirely upon a local statute passed before Confederation, and at the date of that decision still in force, which expressly gave a right of appeal in habeas corpus cases.

It is, therefore, clear to my mind that, when the civil and criminal law of England were introduced into this province on the 19th November, 1858, there was, under the laws of England, no right of appeal in a case like the present; and, if there is now any such right, it must rest upon some statutory enactment. We have been referred to no Act of the legislature prior to the incorporation of British Columbia in the Dominion of Canada providing for any such right of appeal. Since Confederation the practice and procedure in criminal matters rests entirely with the Parliament of Canada, and no right of appeal is given in habeas corpus cases by any Dominion statute or code.

That the present is a criminal cause or matter, I think, cannot be doubted, especially in view of the decision in Ex p. Woodhall, 20 Q. B. D. 832. That was a case where the Queen's Bench Division refused an application for a writ of habeas corpus on behalf of the person committed to prison under the Extradition Act. As the English Judicature Act, sec. 47, contained a provision that there should be no appeal to the Court of Appeal in any criminal cause or matter, the question arose as to whether a case like the present was a criminal cause or matter, and the Court there unanimously held it was. I do not find that that decision has ever been disapproved of. Now, while there is no provision in our Court of Appeal Act that there should be no appeal in any criminal cause of matter, it is not necessary, in my opinion, that there should be such in order to exclude such an appeal, because the Province has no jurisdiction in such a matter at all. Any Act of the Province giving the right of appeal in a criminal matter, in the sense in which jurisdiction is given to the Dominion in such matters, would be ultra vires of the Province. Had this been a case other than a criminal cause or matter, such, for instance, as detention for a breach of a provincial statute, or detention of a person without any authority at all,

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such as was the Barnardo case, an appeal would probably lie to this Court. It is unnecessry to decide that question now, but the Barnardo case would seem to indicate that that would be so.

I think, therefore, the appeal must be quashed, as we have no jurisdiction to hear it.

IRVING, J.A.:—In Ikezoya v. Canadian Pacific R. W. Co., 12 B. C. R. 454, the right to appeal was questioned on two grounds: (1) that, the man having been released, an appeal would be futile, based on Cox v. Hakes, 15 App. Cas. 526; (2) that the Courts had no jurisdiction in the premises, as the matter was a departmental matter. The point raised in this case was not discussed at either of the two arguments.

By sec. 19 of the Extradition Act, the prisoner is advised as to his right to apply for a writ of habeas corpus, but the Act makes no provision for its issue; that is unnecessary, because the right to the writ is a right which exists at common law independently of statute.

The jurisdiction to issue the writ was part of the inheritance of the Supreme Court of British Columbia from the early Colonial Courts, and any person who is in custody under a warrant or order of commitment has a right to have the validity of that warrant or order tested by means of a writ issued out of the Supreme Court, irrespective of the legislative authority governing the issue of the writ.

Then, that Court having given its decision, does an appeal lie to this Court? Mr. Lowe argues that the right of appeal being statutory, and the Dominion Parliament not having dealt with the matter, no appeal lies, relying on the reasons adopted by the Full Court in Rex v. Carroll, 14 B. C. R. 116, where it was held that there could be no appeal to the Full Court from the decision of a single Judge in a criminal case, unless such appeal was given by federal legislation. This argument seems to be unanswerable, and I do not think we have any jurisdiction to hear this appeal. There is possibly another ground on which this conclusion could be reached, that is, that by sec. 132 of the British North America Act, all powers necessary or proper for performing treaty obligations are committed to the federal Parliament.

GALLIHER, J.A., agreed in dismissing the appeal for the same reasons.

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## MANITOBA.

PRENDERGAST, J. MARCH 1ST, 1912.

TRIAL.

# HAM v. CANADIAN NORTHERN R. W. CO.

*Damages—Personal Injuries — Negligence — Railway — Physical and Mental Shock—Neurasthenia.*

**The plaintiff was a passenger in a street railway car which, owing to a collision with a train of the defendants, was thrown into an excavation by the side of the highway. The plaintiff's physical injuries were slight; but, shortly after the accident, he developed traumatic neurasthenia, and brought this action for damages, alleging that the disease was caused by the shock of the collision and the fall. The defendants admitted that the collision was due to their negligence, but alleged that the plaintiff's disease (if it existed) was not caused thereby. The uncontradicted expert medical evidence was, that the disease existed, and was caused by both physical and mental shock:—**

***Held*, that the plaintiff was entitled to recover.**

***Victorian Railways Commissioners* v. *Coultas*, 13 App. Cas. 888, commented upon and distinguished.**

**The plaintiff's damages were assessed at $2,000.**

The plaintiff alleged that he received personal injuries as a result of the defendants' negligence in running one of their trains, and claimed $10,000.

P. C. Locke and C. H. Locke, for the plaintiff.

O. H. Clarke, K.C., for the defendants.

PRENDERGAST, J.:—The particulars filed of the injuries, besides stating that the plaintiff was bruised and shocked, set out further that "since the date of the accident the plaintiff has been a nervous wreck, suffering from traumatic neurasthenia, being unable to sleep at night, and being unable to carry on any business or do any work."

The defendants, by their statement of defence and admissions filed later, take, the position that, while they were negligent as alleged, such negligence did not occasion the plaintiff any bodily injury, and that as to the nervous injury complained of they are not liable at law for the same.

On the day of the accident, the plaintiff was seated to the right at the read end of an open trailer propelled by a motor car of the Winnipeg Electric Railway Company, moving southward on that company's tracks on Pembina street,

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when, having reached the intersection of Rosser avenue, which is a point where the street railway track is diagonally crossed by a line of the defendants, a train of the latter, moving westward at a rate of 15 or 20 miles an hour, ran into the said street railway motor car—the circumstances of the accident being such (as admitted by the defendants), as to constitute negligence on their part. A subway was then being excavated at that place for the purpose of allowing the street railway to run underneath Rosser avenue and the Canadian Northern Railway line; but, at the time, the street railway track, which had been deflected pending the prosecution of the work, was kept running on the street level along and quite close to the east edge of the excavation, which was at that point about 14 feet deep. The sides of this excavation were cut almost perpendicularly, but were supported by timbers set at an angle of about 35 degrees to prevent in the meantime the earth from caving in.

By the force of the collision, the street railway motor car, which was struck square, was wrenched from the trailer, carried some distance forward of the engine and crushed to pieces—which resulted in the loss of one life and injuries to others; while the trailer, receiving the impact at its forward end where it was coupled to the motor car, was swerved around on its hind wheels and fell or slid head-first along the timbers to the bottom of the excavation, where it remained rear end upwards and in a practically vertical position, except for the incline of the timbers.

The plaintiff, who, as stated, was to the right on the last seat of the open trailer, says that the last he remembers before the collision is, that he was watching a pile-driver working down in the subway, and that the first thing that he realised after this was that he was at the bottom of the excavation. He must have been thrown out of his seat to the right by the swerving of the trailer and then have fallen or slid down along the car and timbers to the bottom. The length of the car was given as 24 or 26 feet, but the plaintiff says that his fall was about 20 feet. It does not appear how many passengers were with the plaintiff on the trailer, but he says that the conductor and a boy were also hurt.

The plaintiff, at all events, got on his feet, called out, looked up and saw the train. He says he felt all shaken up, sore and nervous, and that it had "kind of knocked the senses out of him." He, however, crawled up the bank along

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the side of the trailer, looked around and realised the nature and extent of the accident. The motor car was all smashed by the defendants' train. There was the dead body of a lady wedged in under the pony trucks of the engine, and a man very seriously injured was lying in the débris. The plaintiff apparently looked on this scene for an hour or three-quarters of an hour; then he took a street car and went to his home, which was less than a mile further south.

After arriving home, the plaintiff had supper with his wife and related to her the circumstances of the collision, but does not seem to have complained of any special injury except that he had been shaken up. In the evening, upon retiring, he realised that there was an abrasion on his right leg and a sore spot on his head; but these were the only marks or visible wounds if they may be so-called, and the evidence shews that they were of no gravity whatsoever in themselves.

The plaintiff says that he had but little sleep that first night, and still less the following; that he felt more and more uneasy and nervous; that, on the third day, twitching and shooting pains down his back became so violent that he went to consult a medical practitioner (Dr. Clark); that, notwithstanding medical aid, he steadily grew worse; that he lost 40 lbs. of flesh and grew weaker every day; that he suffered from insomnia and impaired memory; that he became unable to exert himself physically; that his walking has become so uncertain that he has to use a cane; that he is unable to work at his trade, which is that of a printer, as he cannot raise his hands without starting violent pains down his spine.

At the time of the trial, which was about six months after the accident, he was still under the treatment of Dr. Clark, who had then attended on him forty or fifty times. Two months after the accident, he was also examined by Dr. Lehmann, acting under instructions from the defendants, and, a few days before the trial, by Dr. Stevenson, at his own request. These three medical practitioners gave evidence at the trial, being called by the plaintiff. No evidence was tendered for the defendants.

The plaintiff's contention is, that he suffers from traumatic neurasthenia—that is, neurasthenia caused by shock either purely mental or both physical and mental.



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I think the plaintiff has fully established that he suffers from that form of disease, whatever may be said later as to whether the shock that caused it was purely mental or both physical and mental.

Of course, as shewn in evidence, where there are no visible wounds or apparent lesions of tissue, or practically none, as in this case, the medical practitioner must depend very largely, and at times almost wholly, upon the patient's history of the case for his diagnosis of the disease.

The defendants contend in this respect that the plaintiff has been malingering, and that all he says of his condition and its connection with the accident is invention on his part. But the medical evidence establishes that, although there are certain objective symptoms of the disease which can be simulated, there are others that cannot, to the eye of the experienced practitioner. Among the latter is the neurasthenic tremor, quite distinguishable from the alcoholic tremor which the defendants say the plaintiff may have been suffering from. There are also the exaggerated reflexes, which lack the usual response and spontaneity when shammed, and the characteristic appearance resulting from the general condition. The plaintiff exhibited all those essential and unmistakable symptoms, besides others less conclusive, especially when taken singly, but also very material as a whole.

Dr. Clark, who saw him forty or fifty times, as stated, says that he watched him very closely, and that he is convinced that the symptoms could not be simulated. And Dr. Lehmann says, not only that he suffers from neurasthenia, but also that he is rather a severe type and a marked case of this ailment.

I find, then, that the plaintiff suffers from neurasthenia caused by shock; and, from the plaintiff's uncontradicted evidence of the collision and his falling down the subway, and that of Dr. Clark, shewing his condition three days after, together with the defendants' admissions as far as they go, the conclusion is unavoidably reached that the disease was the direct result of the accident.

The defendants urge further that, as the only visible physical injuries (abrasion of the leg and swollen spot on the head) were altogether insignificant, the shock which caused the neurasthenic condition was purely mental, as more probably brought on by fright and the horror of the

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scene of destruction near which he stayed for three-quarters of an hour after the accident, and that the plaintiff cannot recover in law for injuries resulting from a purely mental shock.

The defendants rely as to this upon Victorian Railways Commissioners v. Coultas, 13 App. Cas. 888, decided by the Privy Council, and which seems to support the proposition. This case has been the subject of considerable, and generally unfavourable, comment. It is reviewed at length in Beven on Negligence, 2nd ed., p. 67. In Dulieu v, White, [1901] 2 K. B. 669, the Court refused to follow it; and in Pugh v. London Brighton and South Coast R. W. Co., [1896] 2 Q. B. 248, and Wilkinson v. Downton, [1897] 2 Q. B. 57, it is clear that the Court, although basing its judgment on distinctions, discountenances the decision. It was also disapproved in the Irish case of Bell v. Great Northern R. W. Co., 26 Ir. L. R. 428, 445. In Canada, it has generally been considered binding, as in Geiger v. Grand Trunk R. W. Co, 10 O. L. R. 511, and Henderson v. Canada Atlantic R. W. Co., 25 A. R. 437; and I should equally feel bound by that decision of the highest Court of Appeal for this country.

This is, however, not material, in my opinion. The proposition of law there stated does not seem to me to have any application in the present case, as the expert evidence is to the effect that, although the visible wounds or injuries were insignificant in themselves, still the shock which caused the neurasthenic condition was, not only mental, but also physical. I have detailed at length the circumstances of the accident: the collision of the engine with the motor car; the swerving of the latter; its being precipitated down the embankment; and the plaintiff's fall to the bottom of the subway. It is plain that, in such circumstances, the violence of the physical shock cannot be measured alone by the gravity or insignificance of the superficial marks or abrasions. At all events, with what personal knowledge they had from attending and observing the plaintiff, and the circumstances of the accident being fully laid before them, the three medical experts (one of whom examined the plaintiff on the defendants' behalf, although appearing as a witness for the plaintiff) all give it as their opinion that the shock which caused the diseased condition was both physical and mental; and beyond this I do not see that it is necessary or incumbent for me to go.

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The plaintiff should then recover.

He is fifty years old, and his health was apparently good before the accident. He is a printer. He says he has of late years been earning about $85 a month, but there is evidence that his habits as a bread-winner have not been steady. One doctor said that his condition has not improved during the six months that elapsed between the accident and the trial, although it has not become worse; and another doctor said that, while he is rather a severe type of traumatic neurasthenia, still, in favourable surroundings, that is, with rest, his nervous system would probably recuperate. There is also the cost of medical attendance to be taken into account.

On the whole, I would fix the damages at $2,000, for which there will be judgment for the plaintiff, with interest since the 8th July, 1910, and costs.

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## ALBERTA.

BECK, J. FEBRUARY 22ND, 1912.

CHAMBERS.

### REX EX REL. HOGAN v. JOLLIVETTE.

*Municipal Elections—Election of Councillor—Resignation—Disclaimer—New Election—Short Notice — Mandatory Provision of Statute — Invalid Election — Municipal Ordinance, secs. 21, 75, 77, 78, 106.*

P. was elected town councillor for the years 1912 and 1913 at the general municipal elections, the voting for which took place on the 11th December, 1911. He was, at that time, a councillor whose term of office expired on the 31st December. The respondent was, at the general election, "the candidate who received the next highest number of votes." At a meeting of the council on the 15th December, 1911, P. handed in his resignation as councillor for the remainder of the year 1911 and for the years 1912 and 1913, and at the same meeting was appointed Secretary-Treasurer of the town; and a returning officer was appointed for the election of a councillor in his stead. A special election was held, and the respondent was elected:—

*Held*, in a proceeding in the nature of a *quo warranto* to try the validity of the respondent's election, that the Municipal Ordinance, C. O. 1898 ch. 70, by implication, gives the right to any member of the council to resign (sec. 106); and, under sec. 77, a member who has been elected at a contested election may disclaim, with the effect of a resignation, to which the consent of the council is not necessary; and he can resign before the time has arrived at which actual possession of the office is possible; and, therefore, P.'s resignation was effective, and the council rightly proceeded to a new election, in pursuance of sec. 106.

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Section 21 of the Ordinance requires at least six days' notice of a special election, and only five days' notice was given:—

*Held*, that the statutory provision, so far as it related to the length of the notice for a special election, must be treated as mandatory, the notice being the foundation of the election, and it not being possible to say that the result may not be affected; and, therefore, the respondent's election was invalid.

P. delivered a disclaimer on the 2nd February, 1912:—

*Held*, that, as P. was at this time neither *de facto* nor *de jure* a member of the council, this disclaimer was ineffective under secs. 77 and 78.

*Held*, also, having regard to the provisions of secs. 75, 77, and 78, that P.'s resignation of the 15th December was not a disclaimer which had the effect of seating the respondent, who had the next highest number of votes at the general election.

*Held*, therefore, that the respondent was not entitled to his seat as a councillor.

A proceeding by summons in the nature of a quo warranto, under secs. 56 et seq. of the Municipal Ordinance, C. O. 1898 ch. 70, to try the validity of the election of the respondent to the office of councillor of the town of St. Albert.

J. T. J. Collisson, for the relator.

Frank Ford, K.C., for the respondent.

BECK, J.:—The respondent holds the office de facto. He claims to be entitled to hold it de jure on two grounds:—

(1) Because he was elected at a special election held in pursuance of sec. 106—one Piquette elected at the general municipal elections having resigned; and

(2) Because at the general election he was "the candidate having the next highest number of votes" (sec. 78) to Piquette.

A number of more or less intricate questions of construction of provisions of the Municipal Ordinance were argued before me; but I find that it is not necessary to deal with all of them.

Piquette was elected a councillor at the general municipal elections, the voting for which took place on the 11th December. He was, at the time of the election, a councillor whose term of office expired on the 31st December, 1911. He was then elected for the years 1912 and 1913. The respondent, at the general election, was "the candidate who received the next highest number of votes."

At a meeting of the council held on the 15th December, Piquette handed in his resignation as councillor for the remainder of the year 1911 and for the years 1912 and 1913, and at the same meeting was appointed Secretary-Treasurer

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of the town; and a returning officer was appointed for the election of a councillor in Piquette's stead.

It was urged on the part of the relator that Piquette, though he might resign his office of councillor for the remainder of that year, 1911, could not do so for the years 1912 and 1913—in other words, that an officer elect cannot resign the office to which he has been elected. The Municipal Ordinance, by implication, gives the right to any member of the council to resign (sec. 106). Acceptance by the council is, possibly, necessary to make the resignation effective; but, apparently, under sec. 77, a member of the council who has been elected not by nomination only but as the result of a poll, that is, a "contested election," may, at any time before his election is complained of, that is, before it has become a "contested election," disclaim his right to the office, with the effect of a resignation, to which the consent of the council is not necessary.

There being, as I have said, a right under the Ordinance to resign, I cannot see any reasonable ground for the contention that resignation can be made only after the member elect has taken full possession of the office in pursuance of his right. He can equally well, I think, resign his right to the office before the time has arrived at which actual possession is possible. I think, therefore, that Piquette's resignation was effective; and that, therefore, the council rightly proceeded to a new election, in pursuance of sec. 106.

Objection is taken to this new election because the Ordinance requires (sec. 21) at least six days' notice, and the notices were posted on the 16th December for nomination on the 21st December.

It was said that there was authority to the effect that this provision was directory only, and not mandatory, and that non-compliance with it, unless it were shewn to have affected the result of the election, should be disregarded.

In Ontario there is a provision in the Municipal Act (sec. 204) to the effect that no election shall be declared invalid by reason of . . . any irregularity if it appears . . . that the election was conducted in accordance with the principles laid down in the Act and that such . . . irregularity did not affect the result of the election. There is no such provision in our Ordinance; and Mr. Biggar in his Municipal Manual, in his notes to sec. 204, among "examples of irregularities which would probably invali-

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date an election"—as I understand him, in face of sec. 204—gives sec. 127, providing for "at least six days' notice" of the meeting for nomination. I have considered a large number of cases with the result that my conclusion is this. Statutory provisions with respect to time are very often merely directory and not mandatory; for instance, a provision that an election shall be held within a certain time, where, consequently, it would be unreasonable that the office should not be filled, though the time limited has been allowed to pass. Again, in the case of a general election, where the day of nomination and the day of polling are fixed by statute, irregularities in or in respect of the notices directed by the statute may be somewhat readily disregarded. But in the case of a special or casual election, where the date for nomination at least is necessarily brought to the knowledge of the public only by the public notice directed by the statute, it seems to me that the statutory provision, so far at least as relates to the length of such notice, must be treated as mandatory, though irregularities in other respects may be treated as merely directory: first, because that notice is the foundation of the election; and, secondly, because, in such a case, it would be scarcely possible to say that the result might not have been affected by a notice of less duration than that provided by the statute. See 15 Cyc. 320 et seq; Am. & Eng. Encyc. of Law, 2nd ed., vol. 10, pp. 624 et seq. I think, therefore, the special election of the 21st December whereat the respondent was elected was invalid.

Then is the respondent entitled to hold the seat in view of secs. 77 and 78? Section 77 says: "Where there has been a contested election, the person elected may, at any time after the election and before his election is complained of, deliver to the Secretary-Treasurer of the municipality a disclaimer signed by him." Section 78 says: "Where a disclaimer has been made in accordance with the preceding sections" (sec. 75 provides for disclaimer after the election is complained of), "it shall operate as a resignation, and the candidate having the next highest number of votes shall become the councillor."

The respondent was the candidate who at the general municipal elections had the next highest number of votes. Piquette delivered a disclaimer to the Secretary-Treasurer on the 2nd February, i.e., some time after the special elec-

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tion, and still longer after he had, as I have held, validly and effectively resigned.

It seems to me that then—that is, at the time when he was neither de facto nor de jure a member of the council —he could not act under sec. 77; and that, therefore, his disclaimer was ineffective.

The question remains, did his resignation of the 15th December have the same effect as a disclaimer, that is, was its effect that the respondent, having the next highest number of votes at the general election, became the councillor?

Section 78 says that a disclaimer shall operate as a resignation "and" the candidate having the next highest number of votes shall then become the councillor. Is the force of the word "and" here "and therefore" or "and furthermore?" I think it must be taken in the latter sense. In other words, the natural sense and effect of a simple resignation would not be to give the office to the candidate having the next highest number of votes; and, therefore, this further result is—as it is intended—necessarily added; and a disclaimer has the effect of a resignation plus this further result. A resignation, whether or not acceptance is necessary, can undoubtedly be made at any time during the term of office. On the other hand, in my opinion, this is not so with regard to a disclaimer. There are two cases in which it is provided that a disclaimer can be made. First, under sec. 77, before the election is complained of. This, I think, contemplates a terminus—a period of time—within which advantage may be taken of the provision. Complaint against the election can be made (sec. 56) only within six weeks after the election or one month after acceptance of office. The lapse of the later of these two periods is, I think, the ultimate period for the operation of sec. 77. Secondly, under sec. 75, after the election is complained of, the limit of one week is fixed. It is reasonable that a disclaimer which can be made only within a short time after the election should have the effect of giving the seat to the candidate having the next highest number of votes. It is not reasonable that a resignation, which can be made at any time, should have this effect.

I, therefore, must find that the respondent is not entitled to his seat as a councillor; and the usual order will go, with costs.

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## ALBERTA.

STUART, J. FEBRUARY 10TH, 1912.

CHAMBERS.

### RE MOTT.

*Infant—Custody—Habeas Corpus — Application by Father as against Mother—Decree of Foreign Court—Effect of in Alberta—Jurisdiction.*

The applicant and the respondent were married in Illinois, and had their domicile there. They came to Alberta, bringing with them two children, who had been born in Illinois. Another child was born in Alberta. The respondent, the wife, left the applicant and took the youngest child with her, but did not leave Alberta. The husband went to California, and from a Court in that State obtained a decree of divorce, which also gave him the custody of the three children. He then applied in Alberta for a *habeas corpus* for the production of the youngest child with a view to obtaining custody:—

*Held*, that, granting the validity of the California decree, the decision as to the custody of the youngest child, who was a British subject and was and always had been within the jurisdiction of the Alberta Court, was not binding on that Court.

*Hope* v. *Hope*, 43 Eng. Rep. 534, followed.

*Rex* v. *Hamilton*, 17 Can. Crim. Cas. 410, distinguished.

Application by the father of Louise Mott, a child of three years, for a writ of habeas corpus, directed to the mother of the child, to produce the body of the child in Court.

Arthur L. Smith and J. E. A. McLeod, for the applicant,

Frank E. Eaton, for the respondent.

STUART, J.:—I adjourned the hearing of this case yesterday in order that I might inquire into the state of the law in regard to whether or not the decree of the California



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Court which divorced the husband and wife, and also gave the custody of the three children, including the child in question here, to the husband, was binding upon me and settled the question in favour of the husband.

The facts are these. The wife and husband were married in Illinois, and had their domicile there, and two children were born, and they then came to Alberta, bringing with them their children. After they came here, another child, the child in question, was born, while they were living together in Alberta. Then, some time after that, for reasons I know nothing about yet, the wife left the husband, taking the last-mentioned child, the child in question, with her. Then, some time after that, the husband took the two older children with him to California, where his father and mother were living, for the purpose, as he says, of giving them a home and having them cared for. After living there for over a year, he applied in the Courts of California for divorce. The decree there, as I say, gave the custody, not only of the two children who were with him in California, but also the child in question here, who has always been with its mother, and has never left its mother, who was born here and is a British subject, to the father.

There is no doubt in my mind that I do not need to inquire into the validity of the California divorce at all, because, granting that it was valid in every way, I come to the conclusion that the decision there made as to the custody of the child in question here, is not binding upon me. That was the point which came up yesterday. The point is, however, settled in the case of Hope v. Hope, 43 Eng. Rep. 534, in the decision of Lord Chancellor Cranworth. In that case, a British subject and his wife were living in France, where their children were, and all were domiciled in France, and divorce proceedings were going on in the French Courts, and the French Court had given the interim custody of the children to the mother. An application was made in the English Court of Chancery regarding the custody of the children, although they were not in England at all. Lord Chancellor Cranworth deals with the whole question as to the jurisdiction of the English Court over children so situated. I do not need to quote in detail from his decision. He decided that he had authority to deal with the matter, on the ground that they were British subjects, and he made an order requiring the wife to confer with her husband in

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taking all necessary steps for the purpose of delivering up the children to him with a view to their being brought over and educated in England. She appealed from the Lord Chancellor's order, and successfully resisted her husband's application in the French Court for the delivery of the children, on the ground of the pendency of the appeal. On the matter being again brought before the Lord Chancellor, he made another order upon the wife in the same terms, but requiring compliance within a week. This is a much stronger case than the one before me, because the child here is and always has been within the jurisdiction of this Court.

There are other cases too, such cases as Dawson v. Jay, in the same volume, in which the same Lord Chancellor Cranworth refused to transfer the custody of an infant who had been born in New York, but whose father was a British subject according to British law, but also an American citizen, according to American law. He said: "I refuse to order her to be taken back to the United States." But both parents were dead in that case, and it is interesting to see how far the Court did go. All the property of the child was in the United States, and several guardians were appointed in several States; but, simply because the child in a sort of clandestine way was taken to England and was technically a British subject, he refused to order it to be taken away from England. It was twelve years old.

The case of Rex v. Hamilton, 17 Can. Crim. Cas. 410, is distinguishable, because there the child was evidently in Indiana when the order of the Indiana Court was made.

The conclusion is, that I am not bound by the decree of the California Court, and that the father's right can be no stronger by reason of that decree than it is in any case. I think his position as father claiming the custody of his children is far stronger than the position he takes under the California decree. The case will have to go on in the ordinary way as if the father was applying for the custody of his child. Prima facie I should say that it is more in the interest of a female child only three years old to be left with its mother. That is, I think the burden of proof must be placed upon the father to shew that the mother is not a proper person to have possession of the child, and that it is not in the interests of the child to be left with her. The case will be enlarged to permit the father to give this evidence if he is in a position to do so.

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## ALBERTA.

SIMMONS, J. FEBRUARY 15TH, 1912.

TRIAL.

# IMPERIAL LIFE ASSURANCE CO. OF CANADA v. AUDETT.

*Life Insurance—Premiums—Instruments Signed by Insured —Promissory Notes or Agreements in Writing — Construction—Pleading—Point of Law Raised at Trial not Disposing of Whole Action—Defence of Incapacity by Drunkenness — Evidence — Finding — Ratification — Liability for Part of Premium—Cancellation of Policy —Untrue Answer—Policy Avoided—Fraud of Agent— Absence of Ratification.*

The defendant signed applications to the plaintiffs for insurances upon the lives of himself and his children, and signed certain instruments by which he promised to pay the amounts of the first premiums. The plaintiffs sued upon these instruments as promissory notes; and the defendant, by his statement of defence, denied the making, and alleged, in the alternative, that, if he did sign them, he did so when he was under the influence of intoxicating liquor and incapable of contracting, and that the notes were given on account of the premiums, and were unenforceable on account of the defendant's incapacity. In reply, the plaintiffs denied the incapacity, and pleaded subsequent ratification. The notes were dated the 7th and 13th May, 1908, and were due on the 15th November, 1908. They were not paid, and the plaintiffs on the 30th December, 1908, indorsed on them memoranda that the policies were not in force. At the trial, the plaintiffs proved the defendant's signature to the notes and that he had received the policies, and rested their case. The defendant then moved for a dismissal of the action, on the ground that the instruments were not promissory notes, and that the plaintiffs had not proved consideration:—

*Held*, that, although the defendant did not by his pleading raise the point of law as to the interpretation of the written document, he was entitled to raise it at the trial; but, as, if the point were decided adversely to the plaintiffs, it would not substantially dispose of the whole action or of any distinct cause of action, while the defence of incapacity to contract went to the whole merits of the case, it was not necessary, at the trial, to decide whether the agreement was a promissory note or an agreement in writing which did not come within the definition of a promissory note.

And *held*, upon the evidence, that the defendant was drunk and incapable when he signed the applications for insurance and executed the instruments sued on; but that, in regard to the applications for policies upon the lives of his children, he afterwards ratified them so as to make himself liable, and was estopped from saying that there was no contract of insurance for which he was liable: the liability, however, was confined to an amount which would pay the premiums for the period during which the policies were in force—*i.e.*, from their date until the 30th December, 1908, when the cancellation indorsements were made.

And, in regard to the insurance upon the defendant's own life, it was *held*, that there was no contract, because the statement in the application that no company had ever declined to assure the defend-

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**ant's life was admittedly untrue, and this, under a provision contained in the application, avoided the policy; and the untrue statement having been fraudulently inserted by the plaintiffs' agent, without the knowledge or authority of the defendant, who signed the application without reading it, and there being no evidence that it was ever brought to his knowledge, there could be no ratification of it such as might enable the plaintiffs to waive the avoidance term and enforce the contract as voidable only at their option; and, therefore, the defendant was not liable upon the instrument or note given for the premium in respect of the policy upon his own life.**

Action on promissory notes.

J. W. McDonald, for the plaintiffs.

W. M. Campbell, for the defendant.

SIMMONS, J.:—The plaintiffs sue the defendant on two promissory notes for $446.50 dated the 7th May, 1908, and $549.50 dated the 15th May, 1908, respectively, and bearing interest at 6 per cent. per annum, and maturing on the 15th November, 1908.

The defendant pleads denial as maker, and, in the alternative, says that, if he did give the plaintiffs these notes as alleged in the claim of the plaintiffs, he was under the influence of liquor and incapable of contracting when the same were given, and that the notes were given an account of a premium on an insurance policy on the lives of the defendant and his children, and unenforceable on account of the defendant's incapacity at the time of making the notes. The plaintiffs, in reply, deny the incapacity of the defendant when the notes were given, and plead subsequent ratification by the defendant of his acts in giving the plaintiffs the notes in question.

The notes in question are as follows:—

This note must be paid in full at maturity—a renewal hereof will not be entertained.

| | | |
|---|---|---|
| Amount | $446 50 | Due 15th November, B. O. No. 538, H. O. No. 708. |
| Interest | 10 00 | Claresholm, May 7th, 1908. |
| Total | $456 50 | |

On the 15th day of November, 1908, without addition thereto of days of grace, I promise to pay to

The Imperial Life Assurance Company of Canada

or order, at its head office, Toronto, Ontario, the sum of four hundred forty-six and 50/100 dollars with interest at 6 per cent. per annum as well after as before maturity.

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This note is given to the said company in connection with a premium on a certain policy of life insurance. It is hereby agreed, in accordance with a provision of the agreement subscribed to in the application for the said policy and set forth in the said policy, that, if this note is not paid on or before its due date, the said policy will thereupon cease to be in force and will be revived only upon compliance with all the provisions of the said policy relating to its revival. It is hereby further agreed that the liability to pay this note shall continue notwithstanding the lapse of the said policy.

Louis Audett

.....

.....

Exact post office address.

The interest clause in this note must not be erased.

---

This note must be paid in full at maturity—a renewal hereof will not be entertained.

| | | |
|---|---|---|
| Amount | $549 50 | Due 15th Nov., B.O. No. 551, H.O. No. |
| Interest | 10 95 | Claresholm, Alta., |
| | | May 13th, 1908. |
| Total | $560 45 | |

On the 15th day of November, 1908, without addition thereto of days of grace, I promise to pay to

The Imperial Life Assurance Company of Canada

or order, at its head office in Toronto, Ontario, the sum of five hundred forty-nine 50/100 dollars with interest at 6 per cent. per annum as well after as before maturity.

This note is given to the said company in connection with a premium on a certain policy of insurance. It is hereby agreed, in accordance with a provision of the agreement subscribed to in the application for the said policy and set forth in the said policy, that, if this note is not paid on or before its due date, the said policy will thereupon cease to be in force and will be revived only upon compliance with all the provisions of the said policy relating to its revival. It is hereby further agreed that the liability to pay this note shall continue notwithstanding the lapse of the said policy.

Louis Audett

.....

.....

Exact post office address.

The interest clause in this note must not be erased.

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The notes have the following indorsements on the back thereof:—

The Imperial Life Ass. Co.
of Canada.

To whom it may concern:

Policy No. 22297
22305
22306
22307 issued by this company is not now in force and will not be revived by the payment of this note until all the provisions of the said policy respecting revival have been complied with.

Signed this 30th day of Dec., 1908, at Toronto.

T. Bradshaw,
Managing Director.

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The Imperial Life Ass. Co.
of Canada.

To whom it may concern:

Policy No. 22298 issued by this company is not now in force and will not be revived by the payment of this note until all the provisions of the said policy respecting revival have been complied with.

Signed the 30th day of Dec., 1908, at Toronto.

T. Bradshaw,
Managing Director.

---

Counsel for the plaintiffs put in questions and answers 93 and 94 of the examination of the defendant on discovery, which are as follows:—

(93) Q. But you did not know anything about the policies? A. Yes, I had them in the house. The woman shewed them to me.

(94) Q. How do you know you gave the notes for the policies? A. I must have.

The defendant admitted that the above notes were the ones referred to in the above questions and answers, and admitted his signature as maker on the same; and the notes were made exhibits. Counsel for the plaintiffs then rested his case.

Counsel for the defendant then moved for a dismissal of the plaintiffs' action, on the ground that the alleged notes were not promissory notes, but agreements in writing, which

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did not come within the definition of a promissory note, as defined by the Bills of Exchange Act, and that the plaintiffs were, therefore, bound to prove consideration, which they had failed to do.

For the plaintiffs it was contended that the instruments were promissory notes, and, in the alternative, if they were contracts in writing, not coming within the definition of promissory notes, the plaintiffs relied on Order XIX., Rule 20, of the English Rules: "When a contract, promise, or agreement is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract, promise, or agreement alleged, or in matters of fact from which the same may be implied by law, and not as denial of the legality or sufficiency in law of such contract, promise, or agreement, whether with reference to the Statute of Frauds or otherwise."

The application of the defendant for a dismissal of the plaintiffs' action raises a question of law, namely, the proper interpretation of a document in writing executed by the defendant. Is the document a promissory note, or is it an agreement in writing which puts upon the plaintiffs the duty of alleging in their pleadings consideration, and proving the consideration as part of their case? Under Order XXV., Rule 2, "Any party may raise by his pleadings any point of law, and the same shall be disposed of by the Judge who tries the cause at or after the trial, provided that, by consent of the parties or by order of the Court or a Judge, on the application of either party, the same may be set down for hearing and disposed of at any time before the trial."

This Rule should be read with Rule 3 of the same Order, which is as follows: "If, in the opinion of the Court or Judge, the decision of such point of law substantially disposes of the whole action, or of any distinct cause of action, ground of defence, set-off, counterclaim, or reply thereto, the Court may thereupon dismiss the action or make such order therein as may be just."

As a rule, the Court will not stay the trial of the issues of fact after the decision of the questions of law pending an appeal from the latter decision: In re J. B. Palmer, 22 Ch. D. 88.

Demurrers were abolished by Rule 1 of Order XXV.; and Rule 2 of the same Order preserved the right of raising

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objections on points of law. The party who raises a point of law by his pleadings has the right to begin: Stevens v. Chown, [1901] 1 Ch. 900; and, for the purposes of the argument, he is taken to admit all the facts alleged in the opposite pleading: Burrows v. Rhodes, [1899] 1 Q. B. 281; and the Court will take the whole record into consideration and give judgment to the party who on the whole appears entitled to it: Odgers on Pleading, 6th ed., p. 165.

The defendant did not by his pleadings raise the point of law as to the interpretation of the written document. It appears, however, that he was not bound to do so, but at the trial he might urge any point of law he liked, whether raised in the pleadings or not: see Odgers on Pleading, 6th ed., p. 165. In discussing the application of Rule 2 of Order XXV., Odgers on Pleading, p. 170, says: "Where the matter is one of first impression, or where for any other reason the law on the point is not clear, it may be very desirable to argue an objection and settle the point of law before incurring the expense of a trial with witnesses. But in ordinary cases it is generally wiser to raise the objection on the pleadings, but not to apply to have it argued before trial. The usual result of such an argument is, that, if the defendant succeeds, the plaintiff obtains leave, on paying the costs of the argument, to amend his statement of claim . . . Hence, as a rule, it is best not to apply to have any points argued before trial, unless the objection is one that will dispose of the whole action, and which cannot be removed by any amendment which the plaintiff can truthfully make."

It is quite clear that if, at the end of the argument on the question of law raised by the defendant's counsel, it had been decided adversely to the plaintiffs, it would not substantially dispose of the whole action or of any distinct cause of action. Even if not in form a promissory note, the agreement would entitle the plaintiffs to found an action against the defendant. Consideration would not be presumed in their favour, however.

Having reserved the point raised and having heard all the evidence, I think that it is quite apparent that the defence raised by the defendant, namely, incapacity to contract at the time the writing was executed by him, goes to the whole merits of the case. The defendant made out a prima facie case and put upon the plaintiffs the onus of meeting the

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defence of incapacity to contract, and the consequent result of a declaration that the defendant would not be liable. It does not, therefore, seem to be necessary now to decide whether the instrument was a promissory note or an agreement in writing which did not come within the definition of a promissory note. A large number of witnesses were present at the trial, some having come a considerable distance, and it seemed to me in the interests of justice, therefore, to deal with the issues which were disclosed by the evidence as if the pleadings had been made, by way of amendment or otherwise, sufficient properly to raise them.

The defendant is a farmer, who, in the spring of 1908, resided near Claresholm, in the province of Alberta; and, about the 8th May, two agents of the Imperial Life Assurance Company, named Ughland and Stewart, visited him on his farm. The defendant had two farms, one called the "Section" and the other the "Homestead," and the first visit by Ughland and Stewart was at the "Section." The defendant says he told Ughland that he could not pass an examination, and that he had been rejected in Oregon. The defendant further says that Ughland "passed the booze," and they began drinking, and that they emptied the bottle, and Ughland refilled it from a two-gallon jug Ughland had, and he (the defendant) remembers nothing more. In a day or two afterwards, Dr. Learn, Dr. Walwin, and Stewart visited him at the "Section" and made a medical examination in connection with an application for insurance on the defendant's life. About a week after this, Ughland and Stewart visited him at the "Homestead." The defendant says they passed the bottle. The defendant said he did not want any insurance for his children, when they proposed that he should insure the children. Ughland passed the bottle and said, "Have a drink any way," and they emptied the bottle. Ughland and Stewart asked who was working in the field, and the defendant told them Maxwell and Tole were in the field, and Ughland and Stewart went out to the field to solicit insurance from them, and the defendant says he remembers nothing further that day. The defendant says he has no recollection of signing any application for insurance or note or other document on either occasion. When Drs. Learn and Walwin and Stewart came out to the "Section" to examine him, the defendant says: "Stewart got out of the rig first and gave me the wink and produced a

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bottle of whisky, which he and one Maxwell drank at the barn while the doctors went into the house." The defendant says that Stewart told him that the doctors had come to examine him, and he said it was no use, as he had been rejected before. He says he went into the house, and he does not know what took place there.

Maxwell says that, when the two doctors came with Stewart to examine the defendant at the "Section," he had a drink with Audett, and the latter was a little the worse for whisky; and afterwards Ughland and Stewart came to where he (Maxwell) was ploughing on the defendant's homestead, and they had liquor and gave him drinks, and he had a number of drinks with Stewart in the field and at the barn.

Frank McCallum, a neighbour, was at the "Homestead" when Stewart and the two doctors came, and he says Audett was intoxicated and had been so for two weeks. He says he was present when the doctors examined Audett, and the latter was pretty well on in liquor. He heard the doctors ask Audett questions about his relations, his drinking habits, etc., saw them examine his heart and pulse.

Stonewall J. Foles, who was ploughing with Maxwell when Ughland and Stewart visited them at the "Homestead," said they had all kinds of booze, and solicited him and Maxwell for life insurance in the Imperial Life, and he had several drinks from them, and more drinks at the barn when they went to dinner. A few days later, he says, Dr. Learn and Stewart came to examine them, and Stewart had a bottle, and he and Maxwell received drinks from Stewart. This witness says that Dr. Learn said to Audett: "Do you remember the time I went to awaken you up in the barn at Claresholm? Are you drinking as heavy as then?" And Audett answered: "I drink plenty of booze—do that all the time." Dr. Learn replied: "You were dead to the world when I tried to waken you up. Do you remember that?" This was apparently the visit to the homestead when the children were examined by Dr. Learn.

Dr. Learn, a witness for the plaintiffs, denied making the above statements. He also says that Audett was sober then, but he might have had a drink. Dr. Learn did not impress me as a very candid witness, and was not able to give very much detail of what occurred at each of his visits further than what appeared on the medical report. These

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reports are manifestly incorrect in important matters, as in the children's urine tests. I am quite convinced that he never took any samples of the children's urine, and his report is a fraudulent one in that regard. I can attach no credit to his evidence when it is not corroborated by a credible witness.

Dr. Walwin seemed to be a much more candid witness. He says he thinks Audett was capable of transacting business when he examined him, and that Audett admitted he would go to town once or twice a month and have a drink. The plaintiffs were not satisfied with the statements of this witness as to the defendant's weight and use of intoxicating liquor, and wrote him as follows:—

May 18th, 1908.

W. E. Walwin, Esq., M.D.,
Claresholm, Alta.

Dear Doctor,

Re Examination Louis Audett.

We beg to acknowledge receipt of the above examination. The applicant is 45 pounds overweight, yet, you rate him as a first class risk, with no explanation as to what the extra weight is due. A doubt has arisen in the mind of our Chief Medical Referee as to the exact amount of alcohol stimulants which the applicant uses. Will you be good enough to obtain whatever explanation is available on this last point, and also explain the extra weight and oblige,

Yours truly,

.....
Managing Director.

F. S. P./M. E. B.

And, as a result of the receipt of this letter, the witness called Audett in off the street and re-examined him. I do not think that Dr. Walwin remembered very distinctly what took place at the house further than what the medical report and correspondence disclosed, but I cannot help concluding that, at the time of the medical examination by the two doctors, Audett had been supplied with liquor by Stewart, and that he was partly intoxicated, but was not sufficiently intoxicated to be unable to realise that he was being examined in connection with an application to the plaintiff company in regard to an insurance policy on his life, and that he answered questions asked by the doctors as to his family history and other matters. I am not able to conclude

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that he was asked or answered all the questions appearing on the reports of Dr. Walwin and Dr. Learn. The examination was made in a room where there were a number of people—members of the defendant's family and help and neighbours—and conducted in a very desultory way, although the form used by the examiners specifically directs that no third person shall be present during the examination. I am not able to conclude that Audett was asked the questions purported to be asked by the medical men in regard to prior application for insurance and in regard to intoxicating liquor, or that he gave the answers purporting to be made by him in this regard. Audett's wife says that one of the doctors asked him if he was an habitual drunkard, and Audett answered that he used liquor freely at times. As to the appplications for insurance, which the defendant now admits were signed by him, he says he has no recollection of signing them, and, if he did, he must have been drunk and did not know of it. He says the same in regard to the notes. He admits that he signed the amended applications on the children when in town, but he was drinking then with Ughland, and he did not read the documents and did not know what they were. The plaintiffs have not called Ughland or Stewart, and I accept the defendant's statement, which is uncontradicted, that he was drunk and incapable when he signed the applications for insurance on himself and his children. It is quite evident that Ughland and Stewart came to the defendant's place with a considerable supply of liquor anl furnished liquor in considerable quantities to the defendant and to two other men who were working for the defendant then, and solicited and obtained applications from the workmen, as well as from the defendant. If the defendant has not by his subsequent acts ratified what he did in signing the applications and notes when drunk and incapable, he is entitled to the relief he asks for.

In regard to the applications on the children, I find that he did so ratify as to make him liable. He signed amended applications as to the children's insurance, and he must have known that they were examined by Dr. Learn for the purpose of insurance. He was informed by his wife when the policies came to the house, and he stood by and took no objection. In fact he did nothing until payment was demanded, and I think he has done such subsequent

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acts as estop him from relying on the defence of incapacity to contract when the applications were taken and the note signed. The amount of the note sued upon for these premiums is $549.50 and interest. The indorsement on the back of the note is: "To whom it may concern" that the policies for which this note was given as payment for premiums were no longer in force from the 30th December, 1908. The policies are dated the 1st June, 1908, and, according to the declaration on the note, were only in force for seven months, and the insured only had the benefit of seven months' insurance. The liability of the defendant, then, is only for that period, and the proportionate amount of the yearly premiums, aggregating $549.50, is $320.54 and interest for seven months at six per cent. per annum. It is true that the applications say "that, in consideration of the expense incurred in connection with this application, I shall accept the said policy when issued and pay the first premium thereof." I have found as a fact that the defendant was incapacitated when he signed the declaration above referred to and contained in the application, and the acts of ratification which I have found against him do not go so far as to hold him for all that was contained in this document, but only to this extent. that he did such acts as were sufficient to warrant the conclusion that he knew negotiations were being carried on, medical examinations made, applications amended, and policies issued, and took no steps to disavow or disclaim his liability for the same; and he is, therefore, estopped from saying that there was no contract of insurance for which he was liable. The beneficiaries under these policies received benefit to the extent of seven months' insurance, and this is the extent of the consideration given by the insurance company; and the compensation is, accordingly, that proportion of the year's premiums.

As to the note for $446.50, I have to take different ground, and find that there was no contract for insurance between the defendant and the company upon the life of the defendant. The application contains a statement which is admittedly untrue. I refer to the question and answer: "(a) Has any company or society ever declined to assure your life or offered you a policy different from that for which you applied? Ans. No." And the clause (3) of the application: "That, if any evasion, concealment, or misrepresentation, material to the risk, has been or shall be

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made in the answers and statements contained in parts 1 and 2 of my application, the said policy shall be void."

The effect of such an untrue statement in an application for insurance is very fully established in Biggar v. Rock Life Assurance Co., [1902] 1 K. B. 517. In that case the application was filled out by the agent of the company, and many of the answers were false in material respects. The false answers were inserted without the knowledge and authority of the applicant, who signed the application without reading it. It was held that it was the duty of the applicant to read the answers before signing them, and, having signed them, he was held to have adopted them, and that in filling in the untrue answers the agent was the agent of the applicant and not of the company.

The decision of the Supreme Court of the United States in New York Life Insurance Co. v. Fletcher, 117 U. S. 517, is quoted with approval on the same point in this decision of the King's Bench Division.

Now, what happened in the present case is, that a policy issued on the life of Audett, which, as against the company, was absolutely void on account of this untrue statement; and, if he had died, his beneficiary could not have recovered against the company. It does not seem necessary to discuss what the rights of the company might have been against the insured if they elected to waive this defect and enforce the contract as only voidable at their option. Those circumstances could only have applied if Audett had, perhaps innocently, like Biggar, signed an untrue statement upon which the company relied as forming a basis of the contract, with his eyes open and his mind capable. I found as a fact that he did not do so, and there is no evidence that the untrue statement purporting to be made by him in the application was ever brought to his knowledge; and, therefore, he could not ratify it. It was a fraud of the agents Ughland and Stewart upon both the company and the applicant, apparently in order to secure a commission to themselves; and the alleged contract entirely fails on this ground.

There will, therefore, be judgment for the plaintiffs for the sum of $320.54 and interest and costs on the lower scale. The defendant will have a set-off of costs on account of the action having been brought in the Supreme Court under the higher scale of costs.

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## BRITISH COLUMBIA.

GREGORY, J. FEBRUARY 26TH, 1912.

TRIAL.

### LAURSEN v. McKINNON.

*Trespass — Timber Limits — Survey—Adoption by Government — Damages—Measure of—Pre-emption Record — Evidence.*

***Held***, upon the evidence, that the defendant was guilty of wilful and deliberate trespass upon the plaintiff's timber limits, by entering thereon and cutting and removing timber therefrom; and that the plaintiff's damages should be assessed by finding the value of the timber after it was severed and manufactured, so far as it was manufactured while on the plaintiff's limits.

*Union Bank of Canada v. Rideau Lumber Co.*, 4 O. L. R. 721, followed.

The Government, through its land department and Surveyor-General, having accepted the plaintiff's survey and placed it upon the official map as the land belonging to the plaintiff's limits, it gave the plaintiff at least such a right as he could defend against admitted trespassers.

A pre-emption record offered in evidence was *held*, not admissible.

Action to recover damages for trespassing upon timber limits and cutting and carrying away timber therefrom.

Davis, K.C., for the plaintiff.

Ritchie, K.C., for the defendant.

GREGORY, J.:—The defendant was the only witness called on his behalf. He did not attempt to deny that he had cut upon the land lying to the south of his own claim, lot 111; but he swore positively that no timber had been cut west of his westerly side line or a prolongation of it in a southerly direction; and I cannot accept his statement in the face of the satisfactory evidence of King and Maloney. His evidence was, in fact, very unsatisfactory, and I am unable to place any reliance upon it. When asked to explain a contradiction in one important particular between his answers given on discovery and his answers given on the witness-stand, he denied having made the statements attributed to him in the discovery. The discovery was such as to leave no room, I think, for misunderstanding.

I find as a matter of fact that there was a trespass upon the plaintiff's limits plotted on the official map as lot 353 (exhibit No. 9), and also on that portion of his limits lying

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immediately to the west of lot 111, and which, it is not disputed, belong to the plaintiff; also on the land lying immediately to the west of the prolongation of the westerly boundary of lot 111.

The defendant admits having cut upon that portion of the lands claimed by the plaintiff, bounded by the lines and letters F E C D on exhibit 1; but attempts to justify by saying that the same are not included in the area described in the plaintiff's license—that they were vacant Crown lands, and, if he had not cut them, the timber thereon would have been wasted. Strangely enough, he never reported his cutting to the Crown Lands Office. As to a portion of it, he also attempted to justify by shewing that it was necessary to do so in order to get access to the sea from lot 111; but that contention was very weakly put forward—was not proved—and King swore that the little piece of road running through the north-easterly corner of it was not required for the operation of 111—and a glance at the map seems amply to sustain this statement.

He also entirely overlooks the fact that this land was reserved, by notice published in the British Columbia Gazette, 26th September, 1907, p. 8695—a reservation established only a few months after the plaintiff's limits were staked, and which, so far as appears in this case, is still in force.

The defendant further says that, upon an accurate plotting of the lands described in the plaintiff's license, the land F E C D will not be included within it, and so the plaintiff cannot maintain this action, because there is no provision in the Land Act permitting the correction of any inaccuracies in the description of timber limits. If this were so, it would mean that applicants would, at their peril, have to describe with mathematical accuracy any limits they proposed to take up before they are surveyed, which is an impossibility.

Owing to previous accepted applications interfering, the plaintiff could not get all the land included in his license; and, in attempting to follow the description set out in the plaintiff's application, there is some difficulty in making the ends meet. The surveyor swears that the usual practice was adopted of following the same as nearly as possible, and, if the ends do not meet, of bringing them together in the shortest possible way, and in doing so F E C D must be included. The defendant's counsel suggests another way



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of bringing the ends together; but his plan would have the double disadvantage of dividing the plaintiff's limits into two parcels and of unnecessarily depriving him of an additional portion about equal in area to F E C D. The surveyor appears to me to have adopted the least inconvenient and the most natural method, if it is permissible to do this at all. The Government, through its land department and Surveyor-General, has accepted the plaintiff's survey and placed it upon the official map as the land belonging to the plaintiff's limits. Whatever effect this may have, it seems to me that at least it gives the plaintiff some right to it which he can defend against admitted trespassers, such as the defendant, who has not the shadow of right of any kind. The pre-emption record of William Hughes offered in evidence is not, I think, admissible; but, if it were, I do not think it would help the defendant.

The plaintiff took possession. His representatives warned the defendant's foreman before any, or at least much, timber was cut, and again before any of it was removed; but, notwithstanding this, he cut and removed practically all of the timber, stating that the defendant told him to disregard the lines. The defendant personally knew of his foreman's acts; and, although the plaintiff was living in Vancouver, he did nothing. If he had searched the land office, he would, in January, 1910, before the timber was removed, have found the field notes of the plaintiff's survey on file there. Instead, he relied upon his own interpretation of the description in the plaintiff's application. I am not convinced that he even made an innocent mistake as to this.

In these circumstances, he must be found guilty of wilful and deliberate trespass, for which he will have to pay damages.

There will be judgment for the plaintiff for the trespass as claimed and a reference to the Registrar to ascertain the damages; and, in fixing the damages, the Registrar will find the value of the timber after it was severed and manufactured, so far as it was manufactured while on the plaintiff's limits. I do not recall any evidence that will justify damages under any other head, but there will be liberty to apply in case I have overlooked any such evidence.

For the rule as to damages, see the case cited by Mr. Davis, Union Bank of Canada v. Rideau Lumber Co., 4 O. L. R. 721.

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## BRITISH COLUMBIA.

GREGORY, J. FEBRUARY 28TH, 1912.

SINGLE COURT.

# RE FALSE CREEK FLATS ARBITRATION.

*Arbitration and Award—Dominion Railway Act, sec. 198—Damages for Injury to Land—Increased Value—Set-off—Evidence—Admissibility — Misconduct of Arbitrators—Motion to Set aside Award — Claimants Misled by Statement of Arbitrators — British Columbia Arbitration Act, sec. 12 (2).*

Upon arbitrations under the Dominion Railway Act to ascertain the damages suffered by land-owners through the exercise by a railway company of the powers conferred by the Act, in constructing a railway, the company offered evidence of the increased value which the claimants' lands acquired by reason of the construction of the railway, contending that the same should, under sec. 198 of the Act, be set off against the damage suffered. The claimants urged that that provision did not apply, because the railway did not pass "through or over" their lands, the injury to them being caused solely by their being deprived of their access to the sea. The arbitrators took the evidence, and stated that they would make alternative awards or set out in their award the amount they found as damage and the amount they found as benefit or increased value. The arbitrators did not do this, for the reason that no two of the three could agree as to the amounts—if the benefit was to be taken into consideration. In the result, the arbitrators apparently took the increased value into consideration; but no two of them agreed as to the amount of damage or the amount of increased value; they considered, however, that the increase more than offset the damage; and, at the request of the company, awarded each claimant $1 for damages:—

*Held*, that, if the award stood, the claimants were deprived of the opportunity of obtaining the opinion of the Court as to the admissibility of the disputed evidence, which the arbitrators in effect told them should be preserved to them by the form in which the award should be given; the claimants were thus misled—unintentionally—by the arbitrators; and that amounted to such misconduct, within the meaning of sec. 12, sub-sec. 2, of the British Columbia Arbitration Act—which is applicable to an arbitration under the Railway Act, by sec. 209, sub-sec. 4—as enabled the Court to set aside the award.

There may be misconduct, in a legal sense, where there is no ground for imputing improper motives to the arbitrators.

In order to comply with sec. 198, the arbitrators should ascertain the amount of damage and the amount of benefit; otherwise they cannot "set off," as the statute requires, "such increased value" against the damage.

If the award fail to decide on all matters referred for arbitration, whether such omission appears on the face of the award or by affidavit, the Court will set aside the award.

*In re Doberer and Megaw's Arbitration*, 10 B. C. R. 48, 34 S. C. R. 125, and *Duke of Buccleuch v. Metropolitan Board of Works*, L. R. 5 H. L. 418, distinguished.

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Applications by land-owners to set aside the awards of arbitrators in a number of cases under the provisions of the Dominion Railway Act, whereby $1 in each case was awarded as compensation or damages for lands compulsorily taken by a railway company from the applicants, or which had suffered damage through the exercise by the company of the powers conferred by the Act.

A. D. Taylor, K.C., D. Armour, and J. R. Grant, for the applicants.

A. H. MacNeill, K.C., for the company.

GREGORY, J.:—It is contended that the arbitrators so conducted the arbitration as to be guilty of legal misconduct.

While the Railway Act gives the right of appeal only when the award exceeds $600, sub-sec. 4 of sec. 209 of that Act provides that the existing law or practice in any province as to setting aside awards shall not be affected. The Arbitration Act of British Columbia, R. S. B. C. 1897 ch. 9, declares, by sub-sec. 2 of sec. 12, that "where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the Court may set the award aside."

During the arbitration, the company offered evidence of the increased value which the applicants' lands acquired by reason of the construction of the railway, contending that the same should, under the authority of sec. 198 of the Railway Act, be set off against the damage suffered. The applicants urged that that provision did not apply, in the circumstances, as the railway did not pass "through or over" their lands, etc., the injury to them being caused solely by their being deprived of their access to the sea—the railway being built in the bed of False Creek (beyond low water) on lands beyonging to the city of Vancouver. This raised a very nice legal question; and, although counsel, unfortunately, do not exactly agree as to what took place, I think their disagreement is more one of language than of substance; and, on the material before me, it seems clear that the arbitrators agreed to take the evidence and to make alternative awards or to set out in their award the amount they found as damage and also the amount they found as benefit or increased value, and to make an award for the difference, for I do not see how they could make effective alternative awards. An award in the alternative would be no award at all.

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The Chairman of the Board acted as spokesman; but, as neither of his co-arbitrators raised any objection, it seems to me that it must be taken that he spoke for them all.

The arbitrators did not do as they agreed to, for the reason that no two of them could agree as to the amounts—if the benefit was not to be taken into consideration. Had both the benefit and damage been set out in the award, and an award made for the difference in case the damages were the greater, the award would have been bad on the face of it, provided the benefit should not be considered under a true interpretation of sec. 198 of the Railway Act; and, if the award was bad on its face, it could have been set aside by the Court.

It seems clear to me that the arbitrators agreed to leave the matter in such a position that their ruling on the disputed evidence could be reviewed; and the applicants, relying upon that, very likely conducted their case in an entirely different manner than they would have done otherwise.

The arbitrators' statement was equivalent to a promise to state a case for the opinion of the Court, which, it is admitted, they had power, but were not obliged, to do. The applicants, having full confidence in their contention, would naturally pay little or no further attention to the evidence directed to shew the increased value of the lands by reason of the construction of the railway. In the result, the arbitrators apparently took this increased value into their consideration; but no two of them ever agreed as to the amount of damage or the amount of increased value; they considered that the increase more than offset the damage; and, at the request of the company, gave an award of $1 for damages. If their award stands, the applicants are deprived of the opportunity to obtain the opinion of the Court as to the admissibility of the disputed evidence, which the arbitrators in effect told them should be preserved to them by the form in which the award would be given.

In other words, the applicants have been misled—unintentionally of course—by the arbitrators; and, I think, that amounts to such misconduct as enables the Court to set their award aside. If the company's present contention is accepted, the applicants have no remedy whatever, no matter how great an injustice has been done to them; and the

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letters of His Honour Judge Lampman, who was the third arbitrator, indicate that there was no intention of doing this.

There may be ample misconduct in a legal sense to permit the Court to set aside an award, even when there is no ground for imputing the slightest improper motive to the arbitrators; and illustrations of this are to be found in Russell on Awards, 9th ed., p. 367. See also 1 Halsbury's Laws of England, sec. 979, where it is said that, under the English Arbitration Act, 1889, it has been held to be misconduct for an arbitrator to make an award after he has been asked to state a special case.

It may be added that, in order to comply with sec. 198 of the Railway Act, it appears that the arbitrators should ascertain the amount of damage and the amount of benefit; otherwise how can they "set off," as the statute requires, "such increased value" against the damage.

If the award fail to decide on all matters referred for arbitration, whether such omission appears on the face of the award or by affidavit, the Court will set the award aside: Russell on Arbitration, 9th ed., p. 370, and cases there cited; see also In re Marshall and Dresser, 12 L. J. Q. B. 104, where a disputed amount of money was left unascertained.

Had it not been for the arbitrators' promise, there would have been no redress, for there would have been no legal misconduct; and the parties would be bound by the arbitrators' findings of fact and rulings of law.

Mr. McNeill referred to a great many cases, and particularly to In re Doberer and Megaw's Arbitration, 34 S. C. R. 125, but more fully dealt with in the judgment of Mr. Justice Martin in the Court appealed from, 10 B. C. R. 48; also Duke of Buccleuch v. Metropolitan Board of Works, L. R. 5 H. L. 418; but these cases are, I think, quite different in principle from that before me.

As there does not appear to be any authority to refer the matter back to the arbitrators, there will be an order setting aside the awards in all the cases.

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## SASKATCHEWAN.

LAMONT, J. FEBRUARY 20TH, 1912.

TRIAL.

## HARRIS v. GOTTSELIG AND WILLIAMS.

*Negligence—Leaving Explosives Lying on Ground—Injury to Infant—Pleading — Joint Negligence — Master and Servant — Evidence — Nonsuit—Finding of Jury — Liability of one Defendant — Judgment — Joinder of Parties and Causes of Action.*

In an action for damages for injuries sustained by the plaintiff, a boy, from a detonating cap which he picked up from the ground upon a thoroughfare near excavation works carried on by the defendants or one of them, the plaintiff, by the 6th paragraph of his statement of claim, alleged that the injury resulted from the negligence of the defendants or their servants; but, by paragraphs 3 and 4, that the defendant W. employed the defendant G. to do the excavating, and that, for this purpose, G., on his own behalf and on behalf of W., but under the control and direction of W., had used detonating caps negligently and carelessly. There was no other allegation of separate liability on the part of G. The evidence shewed that there had been no joint undertaking on the part of both defendants, and that G. had not used any caps as a servant of W. The jury found the defendant W. guilty of negligence which resulted in injury to the plaintiff, but absolved the defendant G.:—

*Held*, that, as the only allegation in the statement of claim which charged G. with negligence was negatived by the evidence, G. was entitled to have the action dismissed as against him, either as upon nonsuit or upon the finding of the jury.

The defendant W. contended that, as the plaintiff, by his pleading, alleged a joint tort, he must fail unless he established that both defendants were liable:—

*Held*, that an allegation of joint negligence is an allegation of a want of care on the part of each individual defendant; and, having regard to the language of Rule 34, judgment could properly be given against that one of the defendants who was found liable.

*Held*, also, that the plaintiff had not joined two separate causes of action in one claim: only one cause of action was set up.

Motion by the plaintiff for judgment on the findings of a jury in an action for damages for personal injuries.

H. E. Sampson and W. F. Dunn, for the plaintiff.

H. Y. MacDonald, for the defendant Gottselig.

A. Casey and G. F. Blair, for the defendant Williams.

LAMONT, J.:—This action was for damages for personal injuries, caused by the explosion of a detonating cap used for exploding dynamite in blasting operations. The statement of claim alleged (par. 3) that the defendant

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Williams employed the defendant Gottselig to excavate on some land on which the defendant Williams was about to erect a large store; that (par. 4), for the purpose of excavating and the removing of earth and stones, the defendant Gottselig, on behalf of himself and on behalf of the defendant Williams, and under the control and direction of the defendant Williams, had and used on the said premises powerful explosives, including detonating caps; that (par. 5) on the 7th March, 1910, the plaintiff, who was an infant, picked up a detonating cap on a public thoroughfare, which cap exploded, injuring the plaintiff; that (par. 6) the injuries were caused through the defendants, by their servants and workmen, negligently and recklessly bringing the said cap upon the premises of the defendant Williams and negligently placing it or causing it to be placed on the said public thoroughfare.

The action was tried before me with a jury.

The evidence shewed that the defendant Gottselig had entered into a contract with the defendant Williams to excavate for the basement of the building now known as the Glasgow House, and that this contract did not include the taking out of the stone foundation of the old school formerly on the premises, the removal of this foundation being performed by the defendant Williams himself. The work of excavating by Gottselig and the taking out of the foundation by Williams were carried on simultaneously, and both used dynamite for their respective operations prior to the accident to the plaintiff. For the purpose of exploding the dynamite, both used detonating caps. Gottselig's caps were kept sometimes in his pocket and sometimes in a tool-box a few feet from where the plaintiff picked up the cap which caused his injury. The detonating caps of the defendant Williams were also kept at times in this tool-box, and at other times in the pocket of one of his servants. There was no evidence that they had joint ownership or possession of any caps, or that they had been jointly engaged in their use; neither was there any evidence from which a jury could reasonably conclude that, prior to the accident, the defendant Williams had employed Gottselig to assist him in removing the stone foundation. The only operations in which Gottselig was engaged up to that time were those carried on under his contract. There was evidence from which a jury might very readily infer that the defendant Gottselig, in

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carrying on operations under his contract, and the defendant Williams, in removing the stone foundation, were each guilty of negligence in the use of detonating caps.

At the close of the plaintiff's case, counsel for the defendant Gottselig moved that the plaintiff be nonsuited in so far as his client was concerned, on the ground that there was no evidence of any contractual relationship between his client and the defendant Williams, and no evidence that they were acting in concert; and that, therefore, on the pleadings, the defendant Gottselig could not be liable to the plaintiff.

Counsel for the defendant Williams also moved for a nonsuit, on the ground that, as the evidence shewed that there was no joint negligence, and the pleadings alleged only joint negligence, no judgment other than a joint judgment against both defendants could be given.

I refused both motions, stating that I would take the verdict of the jury, and that counsel might, on motion for judgment, argue their respective rights to a nonsuit, if it was then deemed necessary or advisable to do so. Accordingly, I left to the jury the question: "Were the defendants, or either of them, guilty of negligence which resulted in injury to the plaintiff with respect to the care of detonating caps? If either of them, which one?" The jury, it was admitted by counsel for both defendants, fixed the defendant Williams alone with liability.

On motion for judgment by the plaintiff's counsel, Mr. MacDonald, for the defendant Gottselig, asked for judgment for his client, as the jury had exonerated him from liability.

On giving the matter further consideration, I am of opinion that the defendant Gottselig was entitled to succeed on his motion for a nonsuit. The statement of claim (par. 6) alleges that the injury resulted from the negligence of the defendants or their servants; but paragraphs 3 and 4 set up that the defendant Williams employed the defendant Gottselig for the purposes of excavating, and that, for this purpose, the defendant Gottselig, on his own behalf and on behalf of the defendant Williams, but under the control and direction of Williams, had used detonating caps negligently and carelessly. As I understand the language of these paragraphs, they mean that the defendant Gottselig, in using these explosives, was doing so under the control or direction of Williams; or, in other words, that, while he was using

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them, he was doing so as a servant or employee of Williams. There is no other allegation of separate liability on the part of the defendant Gottselig. Therefore, when the evidence shewed that there had been no joint undertaking on the part of both defendants, and that Gottselig had not used any caps as a servant or employee of Williams, it negatived the only allegation in the statement of claim which charged him with liability for the injury; and he was, therefore, entitled to a nonsuit. As, however, the jury negatived negligence causing the injury so far as he was concerned, it is immaterial whether he has judgment on the nonsuit or on the answers of the jury.

The jury having found the defendant Williams guilty of negligence causing the injury, the plaintiff is entitled to judgment against him unless the contention of his counsel be sound. That contention is, that, as the claim alleges a joint tort, the plaintiff fails unless he establishes that both defendants were liable. In my opinion, this contention cannot be supported. Rule 34 provides that all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative, and judgment may be given against such one or more of the defendants as may be found liable. This is express authority for signing judgment against one of several joint defendants if one only is found liable. Apart from the Rule, the meaning of an allegation of tort points conclusively in the same direction. Where two persons are alleged to have been guilty of negligence causing the injury, it means that each one was guilty of a breach of the duty to take care which he individually owed to the plaintiff, and a judgment against two joint tort-feasors means that each one is severally liable for the whole. In other words, an allegation of joint negligence is an allegation of a want of care on the part of each of the individual defendants. There is, therefore, in my opinion, no good ground for saying that, in order to justify a judgment against the defendant Williams, both defendants must have been found liable.

Considerable argument was adduced, and many authorities cited, to the effect that two separate causes of action cannot be joined in one claim. These authorities have no bearing on the present case. No two causes of action are here joined. Only one cause of action is set up in the statement of claim, namely, damages resulting to the plaintiff

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from the explosion of a certain detonating cap, which damage is charged against the defendant Williams as employer and Gottselig as superintending the blasting operations under the control and direction of Williams. No individual liability on the part of Gottselig other than this is alleged against him; and, as I have indicated above, the submission of individual negligence on his part to the jury was superfluous.

The plaintiff is, therefore, entitled as against the defendant Williams to judgment for $932 and costs; as against the defendant Gottselig the plaintiff's action will be dismissed with costs.

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## SASKATCHEWAN.

LAMONT, J. FEBRUARY 20TH, 1912.

TRIAL.

## CARLETON v. CITY OF REGINA.

*Street Railways—Injury to Person Crossing Track—Collision—Negligence—Conduct of Motorman—Rate of Speed—Warning by Sounding Gong—Duty of Person Crossing to Look for Car—Ultimate Negligence—Absence of—Attempt to Avert Collision when Danger Perceived.*

The plaintiff was thrown out of his buggy and injured by a collision with one of the defendants' street-cars, in front of which, at a street crossing, he attempted to cross the avenue on which the defendants' rails were laid:—

*Held*, on the evidence, that the motorman in charge of the car was both careful and efficient; that the car was being driven at an ordinary and reasonably safe rate of speed; and that, on approaching the crossing, the motorman sounded the gong in the usual manner, and followed that up by sounding it violently when he observed the plaintiff approaching the rails.

The plaintiff said that he saw the car (or a car) when it was turning into the avenue (*i.e.*, when it was 630 feet from the point of collision), and thought he had plenty of time to cross, and, when he came to the avenue, did not look to see if the car was coming, and did not see it until it was upon him, and did not hear it approaching:—

*Held*, that it was the plaintiff's duty to look to see if a car was approaching before attempting to cross; and his failure to look was negligence on his part.

*Danger* v. *London Street R. W. Co.*, 30 O. R. 493, and *O'Hearn* v. *Town of Port Arthur*, 4 O. L. R. 209, followed.

The motorman said that, as he approached the crossing, he reduced the speed from eight miles to six miles per hour, and sounded the gong; that, when he was almost a car-length from the crossing, he noticed a man driving on the intersecting street and approaching

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**the car line; that he sounded the gong, and put on the brakes; that he believed the man would come close to the car line and stop there until the car had passed; that, as soon as it appeared that the man was going to cross in front of the car, he (the motorman) released the brakes, reversed the lever, and applied the power so as to send the car in a backward direction; but that, notwithstanding this, the car could not be stopped until after the fender had come in contact with the hind wheel of the plaintiff's buggy:—**

***Held*, that the motorman was justified in not reversing until it appeared that the plaintiff was not going to stop; there was nothing to indicate to the motorman that the plaintiff was not going to follow the ordinary and prudent practice of stopping before reaching the car line; and, as soon as it appeared that the plaintiff was bound to cross, the motorman did all in his power to avert a collision; and was in no way guilty of negligent conduct.**

***Fewings* v. *Grand Trunk R. W. Co.*, 14 O. W. R. 591, and *Jones* v. *Toronto and York Radial R. W. Co.*, 25 O. L. R. 158, referred to.**

***Held*, therefore, that the collision was the result of the plaintiff's own negligence; and his action to recover damages for his injuries must be dismissed.**

Action for damages for injuries sustained by the plaintiff by being thrown out of his buggy, as a result of a collision with one of the defendants' street-cars, while he was crossing Eleventh avenue on Smith street.

J. F. Bryant, for the plaintiff.

S. P. Grosch, for the defendants.

LAMONT, J.:—The plaintiff alleges that the collision occurred by reason of the car being at the time negligently driven by the defendants' servants. The acts of negligence alleged against the defendants in the statement of claim are: (1) that the defendants did not exercise due and proper care in the selection of a motorman to operate the said car; (2) that the said car was driven by the defendants' servants at an excessive and unsafe rate of speed; (3) that the defendants' servants did not sound warning of the approach of the car to the Smith street corner; (4) that the defendants' servants were negligent in that they did not reduce, or did not sufficiently reduce, the rate of speed of the car while crossing Smith street.

As to the first of the above, I find, on the evidence, that the motorman in charge of the car which collided with the plaintiff's buggy was both careful and efficient. As to the second, I find that the car was being driven at an ordinary and reasonably safe rate of speed. I also find that, on approaching Smith street crossing, the motorman sounded the gong in the usual manner, and followed that up by sounding it violently when he observed the plaintiff approaching the car tracks.

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It was only upon the last of the above alleged negligent acts that counsel for the plaintiff made any serious argument that the plaintiff ought to succeed. He urged that the motorman, after he saw that the plaintiff was going to cross ahead of the car, might have reversed his car sooner and thereby have avoided the accident.

The facts as disclosed by the evidence are as follows. The plaintiff was driving south on Smith street about eight o'clock on a star-lit night. He says that some distance north of Eleventh avenue he looked westward and say a car turning on to Eleventh avenue from Albert street (which is 630 feet from the point of accident); that, thinking this gave him ample time to cross ahead of the car, he drove on, and when he came to Eleventh avenue, he did not look to see if the car was coming, and did not see it until it was upon him, and that he did not hear it approaching. According to all the evidence, the plaintiff's horse was going at a trot of four or five miles per hour. The fender of the car caught the hind wheel of his buggy, and he was thrown out. The buggy was not upset, nor was it injured beyond having the hind axle bent about an inch. The plaintiff says that the point on Smith street from which he saw the car turning at the corner of Albert street was thirty-two paces north of the car line. Other evidence shewed that the only point in the vicinity where the plaintiff says he saw it, from which a car turning on Eleventh avenue could be seen, was 72 feet north of the car line on Smith street, and that there was only a space of three or four feet between two houses in which it could there be seen. The evidence also shewed that for a car to go from the corner of Albert street to the point of accident and there collide with the plaintiff, who had gone 72 feet at the rate of five miles per hour, the car must have travelled at the rate of 45 miles per hour, and at the rate of 33 miles per hour if the plaintiff was travelling at four miles per hour. The utmost limit of speed of the car which collided with the plaintiff was 20 miles per hour. It is, therefore, perfectly apparent, either that the plaintiff did not see the car turning from Albert street, as he says; or, if he did, it was a car following the one with which he collided. The car which struck his buggy could not possibly have travelled from Albert street while he was travelling 72 feet at the rate he says he was travelling. Further, the evidence shews that the car stopped after it had turned on

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Eleventh avenue, and that it travelled from Albert street to the Smith street corner at the usual rate of speed, which was about eight miles per hour between crossings and about six miles at the crossings. Considering the small amount of traffic on this part of Eleventh avenue, this was, in my opinion, an ordinarily safe rate of speed. But, even if the plaintiff had seen the car turning from Albert street when he was some distance up Smith street, was it not his bounden duty, when he reached Eleventh avenue, where he was well aware that cars were constantly passing, to have looked to see if the car was approaching before attempting to cross?

The duty of a person intending to cross a street-car line on which he knows cars are constantly running, as well as the duty of the motorman in charge of a car in crossing streets, has received judicial consideration in numerous cases.

In Danger v. London Street R. W. Co., 30 O. R. 493, the plaintiff, who was driving a horse along the same street and in the same direction in which a car was going, turned in front of the car to cross the rails, without first looking or listening to ascertain the position of the car. A wheel of his vehicle was struck by the car, and he was injured. In an action for damages, it was held that he was not entitled to recover, as the accident was caused by his own negligence in not looking to see how close the car was before he attempted to cross.

In O'Hearn v. Town of Port Arthur, 4 O. L. R. 209, the plaintiff, who was driving a horse and waggon along a street on the left side of a car, turned to the right to cross the track, and the waggon was struck by the car, which had been coming behind. The plaintiff said that, about a hundred feet from the point at which he tried to cross, he looked back, and no car was to be seen, and that he did not look again before trying to cross. It was held that it was his duty to have looked, and that his not having done so constituted contributory negligence on his part which disentitled him to recover damages. In that case Mr. Justice Meredith said, at p. 217: "I understand the Danger case to decide this: that, under ordinary circumstances, any one attempting to cross an electric street railway, with a knowledge of the constant running of cars upon it, such as is usual in cities and towns, without looking, is negligent. I entirely concur in that view of every one's duty to himself, and to all else whom he may endanger by want of that

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ordinary care. No reasonable man could, in my judgment, say that, in the facts of this case, there was not great negligence in attempting to cross without looking."

And in Clark's Accident Law, 2nd ed., par. 88, the learned author says: "It is well settled that a person who goes directly in front of a street car, where there is evidence either that he did not look or that there was an unobstructed view so that he might have looked, is not in the exercise of due care."

Here the plaintiff knew that the cars were constantly crossing Smith street on Eleventh avenue. More than that, he knew that a car was approaching. To attempt to cross under these circumstances, without first ascertaining the whereabouts of the car he had seen, and without seeing if there was any other car closer to the crossing, was in my opinion, sheer negligence on his part. Looking meant only turning his eyes to the right, and this he should have done. The defendants had done nothing to mislead him into thinking it was safe to cross. He also says that he did not hear the car approaching. The evidence leaves no doubt whatever in my mind but that the gong was sounded in the ordinary way as the car was approaching Smith street, and then violently as soon as the motorman perceived the plaintiffs approach. The plaintiff's hearing was not defective. The only thing that might interfere with it was the fact that he had the collar of his fur coat turned up. But, even so, I find it difficult to understand how he did not hear the gong. So far as this case is concerned, however, it is immaterial whether the plaintiff heard the gong or not. If he did hear it, and attempted to cross because he believed he could get over before the car reached him, it was a foolhardy thing to do, and any injury he received on account of his miscalculating the distance or time can be attributed to no one but himself. On the other hand, assuming that he did not hear the gong, he admits that he attempted to cross without looking to see where the car was, or if there was any danger in his so doing. This, according to the above authorities, is negligence.

But it was argued that, even if the plaintiff was negligent in not looking to see where the car was before attempting to cross, yet the motorman could, by the exercise of reasonable care, after he saw the plaintiff was going to cross, have stopped the car and avoided the accident. It is the

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duty of a motorman in taking his car over a crossing to keep a reasonable look-out for pedestrians and vehicles using the same crossing. A street-car and other vehicles have an equal right to use the crossing, but in using it both must exercise reasonable care to avoid collision. The motorman in his evidence stated—and I accept his testimony—that, as he approached Smith street, he slowed down the car from eight miles to six miles per hour and sounded the gong; that, when he was almost a car-length from Smith street, he noticed a man driving south on Smith street and approaching the car line; that he sounded the gong, and put on the brakes; that he believed the man would do as many people are accustomed to do, that is, come close to the car line and stop there until the car has passed; that, as soon as it appeared that the man was going to cross in front of the car, he released the brakes, reversed the lever, and applied the power so as to send the car in a backward direction; but that, notwithstanding this, the car could not be stopped until after the fender had come in contact with the hind wheel of the plaintiff's buggy. The plaintiff's counsel contended that he should have reversed the power sooner. The question is, was he justified in not reversing until it appeared that the plaintiff was not going to stop? I am clearly of opinion that he was. It is a matter of common daily occurrence for a motorman to see both pedestrians and vehicles approach a track on which a car is moving and stop when they come within a few feet of it and allow the car to pass. A prudent and cautious man would not attempt to cross in front of a moving car unless there was clearly time to cross safely. If there is nothing to indicate to the contrary, a motorman is justified in assuming that a person approaching his car-line will use ordinary prudence, and will not attempt to cross when there is danger in so doing; but the moment the motorman perceives there is danger, it is his duty to act as promptly as he can to avert the danger. See Fewings v. Grand Trunk R. W. Co., 14 O. W. R. 591, and Jones v. Toronto and York Radial R. W. Co., 25 O. L. R. 158. In this case it is not shewn that there was anything to indicate to the motorman that the plaintiff was not going to follow the ordinary and prudent practice of stopping before reaching the car-line; and, on the evidence, I find that, as soon as it appeared that the plaintiff was bound to cross, the motorman did all in his power to avert a collision. I cannot find that he was in any way guilty of negligent conduct.

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I am, therefore, forced to the conclusion that the collision occurred as the result of the plaintiff's own negligence, and that he has no one but himself to blame for the injuries he received.

There will be judgment for the defendants with costs.

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## SASKATCHEWAN.

WETMORE, C.J. FEBRUARY 21ST, 1912.

TRIAL.

## ADOLPH v. GOOD.

*Vendor and Purchaser—Contract—Exchange of Land for Piano—Absence of Written Memorandum — Possession of Piano by Vendor—Delay of Purchaser — Death of Vendor—Absence of Title or Interest in Vendor—Action against True Owner as Administrator—Specific Performance — Damages — Part Performance — Retention of Piano—Equivocal Character of Possession — Agreement to Resell—Absence of Knowledge by Vendor—Conversion of Piano—Absence of Demand and Refusal—Pleading—Vagueness—Adoption of Piano as Asset of Vendor's Estate.*

In 1907, the plaintiff lent a piano to the defendant's wife, and it continued in her possession until the spring of 1908, when the plaintiff told her that he was going to sell it, and would take $200 cash for it. She had not the cash, but offered him two lots of land in exchange for the piano. The plaintiff accepted the offer, and left the piano where it had been since 1907, and where it remained, and the defendant's wife agreed to give the plaintiff the lots. No written agreement or memorandum was signed by any one. The plaintiff made no application for a transfer of the lots until April, 1910. On the 1st July, 1910, the plaintiff made an agreement in writing for the sale of the lots to C. The defendant's wife died in September, 1910; and the defendant took out letters of administration to her estate. There was no evidence that the defendant or his wife knew of the agreement with C. Neither the plaintiff nor any one claiming under him ever entered into possession of the lots. The defendant's wife did not own the lots, and had no right or interest in them—they were the defendant's lots:—

*Held*, in an action against the defendant as administrator of his wife's estate, that specific performance of the agreement made with her could not be decreed.

*Held*, also, that specific performance could not be decreed against the defendant personally, even if he were sued in his personal capacity—no agreement to sell the land was proved as against him personally.



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*Held*, also, that the plaintiff was not entitled to damages as against the estate of the wife: there was no such part performance of the agreement as to take it out of the Statute of Frauds. The retaining of the possession of the piano was of such an equivocal character that it did not necessarily point to an agreement of sale. Nor did the making of the agreement with C. amount to a part performance.

*Held*, also, that, as there was no demand and no refusal, there was no liability for the conversion of the piano.

By a paragraph of the statement of defence, the defendant admitted that there was among the assets of his wife a piano, "which the defendant says, was paid for in full:"—

*Held*, that this was so vague that no attention should be paid to it; but, even assuming that the piano mentioned was the plaintiff's piano, the mere fact that the defendant put it in the inventory as part of the wife's assets, would not amount to a part performance by him as administrator of any contract of sale on the part of his wife; for he swore that he had no knowledge of any such contract, and there was no evidence to the contrary.

Action for specific performance and damages.

J. E. Chisholm, for the plaintiff.

Emil Gravel, for the defendant.

WETMORE, C.J.:—I find the following facts:—

The plaintiff was possessed of a piano. His wife died, and he was about selling his furniture, and, at the request of Rubina A. Good, he left the piano with her for the use of her daughter until he made up his mind as to what he was going to do with it. This was in 1907. The piano continued there until the spring of 1908, when the plaintiff informed her that he was going to sell it, and would take $200 cash for it. She told him she did not have the cash. In June, 1908, she offered him the lots set out in the statement of claim, being lots 51 and 52, block 27, in City View subdivision of the city of Moose Jaw, in exchange for the piano. The plaintiff accepted the proposition, and agreed to leave the piano in Mrs. Good's house, where it had been since 1907, when the plaintiff left it there, and it has been there ever since; and Mrs. Good agreed to accept it, and to give the plaintiff the lots in question. There was no written agreement or memorandum signed by any person. Mrs. Good died about the 14th September, 1910, and her husband, the defendant, took out letters of administration to her estate. The plaintiff never made an application for a transfer until April, 1910, nearly 22 months after the agreement was made.

On the 1st July, 1910, the plaintiff, by articles of agreement, agreed to sell these lots to one Charlie Chow. There

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is no evidence that Mrs. Good or the defendant was aware of this agreement.

Neither the plaintiff nor any person claiming under him ever entered into possession of the lots. As a matter of fact, Mrs. Good never owned these lots: she had no right or interest in them whatever: they belonged, and still belong, to her husband. Specific performance cannot, therefore, be granted.

I can find cases which establish that, if the vendor has any interest whatever in the property, and the purchaser chooses to take it, specific performance will be decreed with an abatement. But I can find no case where the vendor has no interest whatever where specific performance has been granted. It seems to me that to decree it, under such circumstances, would be against one of the rules governing relief of that character, namely, it would be useless.

I may state that an effort was made at the trial to obtain a decree for specific performance against the defendant personally. That cannot be granted in this action, because he is sued as administrator of his wife, and not otherwise. I cannot, however, discover any grounds for such a decree against him personally. One or two letters were written by Messrs. Grayson and Armstrong to the plaintiff. They, however, were acting for the plaintiff, and the letters were written to acquaint the plaintiff with the result of an interview they had had with the defendant at the plaintiff's instance: they were not written by them as the agents of the defendant at all. A letter was put in evidence purporting to be signed by the defendant and written to the plaintiff. As a matter of fact, it was not written by the defendant. It was written by one of the defendant's daughters, at the instance of her mother, without the defendant's knowledge or authority. No agreement to sell the land was proved as against him personally.

The only question that remains is, whether the plaintiff is entitled to damages as against the estate of Mrs. Good; and that depends upon whether there was such a part performance of the agreement as to take it out of the Statute of Frauds. It is set up on the part of the plaintiff that his agreeing that Mrs. Good should retain the piano, and that she retained it, was part performance. I am of opinion that the retaining of possession was of such an equivocal character that it did not necessarily point to an agreement

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of sale. There was no actual change of possession. There was no overt act and there were no surroundings which pointed to any change of character in Mrs. Good's continued possession. It was just as much in keeping with the possession she got in 1907 as it was with a possession by any agreement of sale.

In Maddison v. Alderson, 8 App. Cas. 467, Lord Selborne lays down the following, at p. 479: "All the authorities shew that the acts relied upon as part performance must be unequivocally and in their own nature referable to some such agreement as that alleged."

Then does the executing the agreement to Charlie Chow amount to a part performance? This agreement was executed more than two years after the agreement was made between the plaintiff and Mrs. Good. As I have before stated, the fact of its being executed was not communicated to her in her lifetime, or to the defendant since her death, before action brought. I am of opinion, therefore, that that was an act which comes within the class of acts referred to by the learned author of Fry on Specific Performance, 4th ed., p. 273, as being of that sort which are "the mere acts of the party doing them: the other party is not necessarily cognizant of them, and consequently he is not so bound by them as to make it fraudulent in him subsequently to refuse to carry the contract into effect." The latter part of this citation is especially applicable to the circumstances of this case, assuming that the act of executing the transfer could, under ordinary circumstances, be held to be an act of part performance, because no act of the plaintiff which can be held to be an act of part performance was done until over two years from the date of the alleged agreement.

The result is, that I hold that there was no agreement binding on Robina in her lifetime or on the defendant as her administrator since her death to enable me to give damages in this action.

Evidently no liability on the part of the deceased intestate or the defendant as her administrator for a conversion at common law was established. There was no demand and refusal proved. It is, therefore, unnecessary to determine whether, if there had been, I could give damages for the value of the piano in this action.

There is a paragraph in the statement of defence which has caused me to hesitate somewhat in reaching this con-

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clusion. That paragraph is as follows: "The defendant admits that there was among the assets of the said Robina A. Good a piano, which, the defendant says, was paid for in full." If the piano mentioned therein is the piano in question, the plea is false, because that piano was not paid for. But I cannot, under any circumstances, understand why that paragraph was pleaded. It denies no allegation in the statement of claim, nor confesses and avoids any such allegation. It appears to be merely a gratuitous statement that seems to serve no purpose, except possibly seriously to embarrass the defendant's defence. I have come to the conclusion that the paragraph is so vague that I would not be justified in paying attention to it. It is vague because it is not alleged that the piano specified is the one in question. But, assuming that it is, the mere fact that, finding this piano among his wife's effects, he put it in the inventory as part of her assets, would not, under the evidence, amount to a part performance by him as administrator of any contract of sale on the part of the deceased; for he swore, in effect, that he had no knowledge of any such contract or agreement, and there is no evidence to the contrary.

Judgment for the defendant with costs.

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## SASKATCHEWAN.

LAMONT, J. MARCH 1ST, 1912.

TRIAL.

### MUNICIPAL CONSTRUCTION CO. v. CITY OF REGINA.

*Contract—Work and Labour—Municipal Corporation—Construction of Waterworks and Sewers—Separate Contracts—Resolutions of Council—Formal Agreement — Cancellation of one Contract—Effect on the Other—Right to Cancel — Time — Waiver — Reasonable Time—Notice to Complete—Measure of Damages — Counterclaim — Deduction for Delay—Failure to Deduct — Waiver of Right—Damages for Failure to Complete Work—Set-off.*

The defendants, a city corporation, being desirous of constructing certain sewers and waterworks, drew up specifications, and asked for tenders. The plaintiffs tendered for all the work to be done. The city council, by two resolutions, passed on different days, accepted

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(a) the plaintiffs' tender for sewer construction and (b) the plaintiffs' tender for waterworks construction. The defendants notified the plaintiffs of each resolution immediately after each was passed. A formal contract was drawn up and executed by the plaintiffs and by the mayor and city clerk on behalf of the defendants under their corporate seal. This contract covered both classes of work. The second resolution provided that the mayor and city clerk be authorised to execute a contract for the waterworks construction. There was no such clause in the first resolution; and no authority was given to the mayor and city clerk to execute any contract other than as set out in the second resolution:—

*Held*, that there were two separate contracts—not an entire contract; and the cancellation by the defendants of the portion relating to the waterworks was not a cancellation of the remainder; and it was open to the plaintiffs to go on and complete the sewers, which they did not do.

*Held*, also, that the defendants were not justified in cancelling the waterworks contract. If time ever was of the essence of the contract, it was waived by the defendants; and it was, therefore, the duty of the defendants to notify the plaintiffs that they must complete within a specified time, which must be a reasonable time; and, not having done so, the defendants were liable in damages for the loss sustained by the plaintiffs.

*Held*, also, that the measure of damages was the difference between the contract-price for the unfinished portion of the work and the cost necessary to complete that work in one month, which would be a reasonable time.

*Held*, also, that the defendants were not entitled, upon their counterclaim, to recover the sum of $10 per day which, the contract provided, should be deducted from any moneys which might be due to the plaintiffs for each day that the work remained uncompleted after the specified time of completion; as the defendants had not made the deduction, they had waived their right to collect the $10 per day.

*Held*, however, that the defendants were entitled, upon their counterclaim, to recover general damages from the plaintiffs for the breach by the latter of the sewer construction contract by failure to complete the work.

Set-off of damages *pro tanto* directed.

In this action the plaintiffs claimed damages for breach of contract by the defendants in refusing to allow them to finish the construction of certain works for which they had received the contract.

C. E. D. Wood and R. E. Turnbull, for the plaintiffs.

J. F. Frame and S. P. Grosch, for the defendants.

LAMONT, J.:—In the spring of 1907, the defendants, being desirous of constructing certain sewers and waterworks, drew up specifications of the desired works, and asked for tenders in reference thereto. The specifications for the sewers were separate from the specifications for the waterworks. The plaintiffs tendered for all the work to be done. On the 15th June, 1907, the city council, adopting a report of the works committee, passed the following resolution: "That the tender of the Municipal Construction Company

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be accepted for sewer constructions according to the city engineer's plans and specifications and in accordance with his report to the amount of about $24,890, subject to any changes that may be found necessary upon further examination of the area to be drained." And on the 26th June the city clerk notified the plaintiffs that their tender for sewer construction had been accepted. On the 2nd July, the city council, adopting a recommendation of the waterworks committee, enacted as follows: "That the tender of the Municipal Construction Company be accepted for trenching and laying all sizes of water-pipe for 57 cents per lineal foot, and that the mayor and city clerk be authorised to execute a contract, when prepared by the city solicitor." And on the 5th July the city clerk notified the plaintiffs that the council had accepted their tender for trenching and laying water-pipes, and that a contract therefor would be prepared immediately. A contract was drawn up, dated the 15th June, 1907, and was executed under the seal and on behalf of the city by the mayor and the clerk, and by the plaintiffs, also under their corporate seal. That contract embodied not only the plaintiffs' tender and the city's acceptance as for the trenching and laying of the water-pipes, but covered their tender and the city's acceptance in reference to the sewers as well. No authority was given to the mayor and city clerk to execute any contract other than as set out in the resolution of the 2nd July above referred to. That resolution was not under the seal of the city. The specifications for both sewers and water mains contained the following clause: "The following specifications shall be taken in conjunction with the general conditions, and regarded as one specification."

The general conditions which were embodied in the contract contained a clause that the work must be started not later than ten days after a written order had been given by the engineer to the contractor to begin work, and that the work must be completed within two months after such order had been sent.

On the 18th July, the city engineer notified the plaintiffs to proceed with the work of laying sewer-pipe as per their contract, and on the 22nd July he notified them to begin laying the water-pipes. The plaintiffs began the work specified, but did not finish it within the two months stipulated in the agreement. At the expiration of the two months, no complaint, so far as the evidence shews, was

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made to the plaintiffs on account of their not having completed their work within the specified time. The city engineer continued laying out work for them until as late as the 2nd December, when he furnished them with the Rose street cuttings. On the same day (the 2nd December), the plaintiffs wrote to the engineer and asked permission to suspend operations until the following spring. No permission was given. The plaintiffs continued working until the end of December, when, without permission from the defendants, they suspended operations. They admit that they could have continued with the work, but that, owing to the cold weather, it would not have been profitable so to do. When they suspended operations, the plaintiffs had completed, roughly speaking, about one half of the work covered by the contract; that is, one half of the sewers and one half of the work of laying the water-mains. In addition to that, there was a quantity of work of a similar kind done by them, at the request of the city engineer, on streets other than those set out in the contract. For all the work done by them, whether under their agreement or otherwise, the plaintiffs were fully paid by the defendants.

On the 11th May, 1908, the plaintiffs wrote to the city engineer asking for instructions to begin work. Not receiving any reply from him, they on the 23rd May wrote to the mayor and council stating that they were waiting for instructions to proceed with the work of their contract. On the 1st June, 1908, the council adopted a report of the waterworks committee which recommended that the city engineer be instructed to notify the plaintiffs that, owing to their failure to complete their work in 1907, it had been resolved to cancel the said contract "as regards the waterworks therein specified and unfinished." On the 5th June, the engineer notified the plaintiffs that the defendants had cancelled the contract "as regards waterworks therein specified and unfinished." No further work was done by the plaintiffs under their contract.

On the 30th May, 1911, they commenced their action, in which they contend that the cancellation of the waterworks portion was a cancellation of the whole, and they claim as damages the profits which they would have made had they been allowed to complete the contract.

The first question is, was the contract an entire one? I am very clearly of opinion that it was not. The defendants'

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acceptance on the 15th June of the plaintiffs' tender for the construction of the sewers, and their acceptance on the 2nd July of the plaintiffs' tender for trenching and laying the water-mains, shew that they were contracting for the construction of the sewers separately from the laying of the water-mains. The embodying of these two separate contracts in one formal document by the city officials could not make them one entire contract, with the rights and obligations of a single contract, as distinct from the rights and obligations belonging to or devolving upon the parties under two separate contracts, unless it was the intention of the parties so to do. There is no evidence whatever that the defendants ever contemplated any state of affairs different from what would flow from their separate acceptances of the plaintiffs' tenders for the two separate pieces of work. No authority was given to the city officials to embody these two in one document; and they must, therefore, be considered in their legal effect as constituting two separate contracts. Consequently, the cancellation by the defendants of the portion relating to the waterworks was not a cancellation of the remainder, and it was open for the plaintiffs to go on and complete the sewers. This they did not do. Their action, therefore, in so far as it relates to anything excepting the contract for trenching and laying water-pipes, must fail.

The next question is, were the defendants justified in cancelling the waterworks contract? For the plaintiffs it was contended that, as the defendants had continued, after the time specified in the contract for the completion of the work, to map out work for the plaintiffs and give them cuttings, the time for completion was, therefore, waived; and it was necessary for the defendants to fix a new time within which the plaintiffs could be called upon to finish the work, before that work could be taken away from them. For the defendants it was contended that the plaintiffs, by stopping work altogether at the end of 1907, had abandoned the contract. As to this contention all I need say is, that the defendants did not treat the suspension of operations by the plaintiffs as an abandonment of the contract.

As to the plaintiffs' contention that they were entitled to have a new day fixed for completion, the general rule is laid down by Lord Halsbury in his Laws of England, vol. 3, at p. 191. as follows: "In cases where time has not been made of the essence of the contract, or where, although

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time originally was of the essence of the contract, the time so fixed for completion has ceased to be applicable by reason of waiver or otherwise, the employer has still a right by notice to fix a reasonable time for the completion of the work, and, in case the contractor does not complete by that time, to dismiss the contractor."

In Taylor v. Brown, 9 L. J. Ch. 14, the Master of the Rolls said: "Where the time is not of the essence of the contract, where the contract is to be performed within a time which is not defined, and there be any unnecessary delay by one party, the other has a right to limit the time."

See also remarks of Lindley, L.J., in Lowther v. Heaver, 41 Ch. D. at p. 268.

In the present case, if time ever was of the essence of the contract, it was clearly waived by the defendants. It was, therefore, the duty of the defendants to notify the plaintiffs that they must complete within a specified time, which must be a reasonable time; otherwise they would be dismissed and their contract taken from them. Not having done so, the defendants are liable in damages for the loss sustained by the plaintiffs. The measure of such damage is the loss of profits they would have sustained in case they had completed the works upon notice from the defendants to complete within a reasonable time. In view of the fact that the plaintiffs undertook to complete both sewers and waterworks in two months, and that about one-half of the work still remained to be done, I am of opinion that one month would have been a reasonable time within which they might have been called upon to complete. The measure of damages to be allowed would, therefore, be the difference between the contract-price for the unfinished portion of the work and the cost necessary to complete that work in one month. At the trial, it was agreed between the parties that the question of the quantum of damages should stand over and be determined later, either by the Local Registrar or myself, in case that question became material.

The defendants counterclaimed for damages for the non-completion by the plaintiffs of the work. They claimed under two separate items: (1) they claimed to be entitled to $10 per day as liquidated damages from the time the plaintiffs should have, according to the contract, completed the waterworks, until the 5th June, 1908, when the plaintiffs were notified that their contract was cancelled; (2) they

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claimed general damages for the failure of the plaintiffs to complete the contract and the additional cost to the defendants rendered necessary by such failure.

As to the first of these claims, the general conditions in the contract include the following clause: "(5) Should the contractor fail to complete the work within the specified time, the sum of $10 per day shall be deducted from any moneys which may be due him from the city, estimated as liquidated and fixed damages to the City of Regina, for each day that the work remains uncompleted after the specified time of completion, the time of completion being an essential element in consideration. The engineer's certificate as to such number of days shall be final between the parties."

At the time the defendants cancelled the plaintiffs' contract as to the waterworks, there were certain moneys still owing to the plaintiffs by the defendants under the contract. On the 31st December, 1908, the city engineer wrote the city treasurer enclosing his final certificate in reference to the work done by the plaintiffs. That certificate shews a balance of $1,796.45 due to the plaintiffs. Pencil computations on the letter itself shew that this sum was made up as follows: $128.60 on account of sewer construction, and $1,667.85 on account of the trenching and laying of the water-mains. On the 4th January, 1909, cheques for these separate amounts were issued by the city treasurer in favour of the plaintiffs, and subsequently paid. No deduction was made for failure to complete within the specified time, either from the progress estimates paid by the defendants during the course of construction or the final estimate of the 31st December, 1908.

On the question whether or not a failure to deduct a sum stipulated for as liquidated damages amounts to a waiver of the penalty clause in the contract, Lord Halsbury, in his Laws of England, above referred to, vol. 3, p. 246, states the rule as follows: "Where it is merely provided that the employer shall be entitled to deduct or retain such liquidated damages as and when they become due from any payments to be made to the contractor, without any independent covenant on the part of the contractor to pay the liquidated damages, the employer will lose his right to claim the liquidated damages which have already accrued if he does not so deduct them. Where, however, the contract con-

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tains an independent covenant by the contractor to pay the damages, coupled with a right for the employer to deduct or retain them from payments to be made by him, the employer has a double remedy; and, though he may have lost the right of deduction, he may still recover the liquidated damages against the contractor." See also Duckworth v. Alison, 1 M. & W. 412, and Clydebank Engineering and Shipbuilding Co. v. Don José Ramos y Castaneda, [1905] A. C. 6. As the contract makes provision only for the deduction of the penalty in case of non-completion, and as the same was not deducted, I am of opinion that the defendants have waived their right to collect it.

The defendants also counterclaim for general damages, on the ground that the plaintiffs abandoned their contract and the work they had undertaken to do, thus necessitating to the defendants aditional expense to get it completed. In so far as the construction of the sewers is concerned, the plaintiffs did abandon the work. For this breach the defendants are entitled to recover such damages as they have sustained thereby.

The result is, that the plaintiffs are entitled to recover such damages as they can shew that they sustained by virtue of the improper cancellation by the defendants of the contract for the trenching and laying of the water-mains, and the defendants are entitled to recover from the plaintiffs the damages they sustained by reason of the failure of the plaintiffs to complete their contract for sewer construction. There will be a right of set-off. Upon application by either party, I will fix a day for the hearing of evidence as to the quantum of damages.

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## SASKATCHEWAN.

WETMORE, C.J. MARCH 2ND, 1912.

CHAMBERS.

## RE LOCKHART.

*Executors and Administrators—Sale of Land of Intestate to one Administrator—Approval of Sale by Court—Leave to Administrator to Purchase—Consent—Advantageous Sale—Practice—Originating Summons—Rules 578, 624 (8)—Forms 79, 80 — Forum — Judge in Chambers—Land Titles Offices—Transfer by Administrator to himself as Individual.*

The administrators of the estate of a deceased person applied, by originating summons, following form No. 80 in the Rules of Court, 1911, returnable before a Judge in Chambers, for an order approving of the sale by the administrators to one of themselves of the lands of the intestate and the crops grown thereon in 1911:—

*Semble*, that the application could not be entertained under Rule 578, because there was no cause or matter pending relating to any real estate; but, if the application did lie under that Rule, form No. 79 should have been followed.

And *held*, that the application could be entertained under paragraph 8 of Rule 624; and, therefore, the proper form was used and the proper forum resorted to.

*Held*, also, that there was no power to make a vesting order under Rule 624 (8).

The practice in the land titles offices since *Re Galloway*, 3 Terr. L. R. 88 (though, perhaps, not warranted by that case), of accepting a transfer from an executor or administrator as such to himself personally, where he is beneficially interested, should not be disturbed.

The proposed purchaser, being one of the administrators, and therefore a trustee, had no right to purchase without the leave of the Court; but, in approving of the sale to him, in order to carry out that approval, it should be ordered that he have leave to purchase.

And, upon the evidence, the sale should be approved, seven of the eight persons beneficially interested in the land consenting, and the sale being an advantageous one.

This was an application by originating summons on the part of the administrators of the estate of Marion Lockhart, deceased, for the approval of the sale by them to Alfred Percy Lockhart of the intestate's real estate, being the north-east quarter of section 14, township 25, range 13, west of the 2nd meridian, and the crops grown last year thereon.

WETMORE, C.J.:—The summons was taken out returnable before the Judge in Chambers, as provided by form No.

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80 in the Rules of Court, 1911. It was contended that the application could be entertained under Rule 578. I am inclined to the opinion that it cannot be entertained under that Rule, because there is no cause or matter pending relating to any real estate; but I express no decided opinion. I am of opinion, however, that, if the application would lie under that Rule, the wrong form of summons has been adopted; that form 79 should have been followed. There seemed to be some doubt, at the hearing of the application, as to when forms Nos. 79 and 80 were respectively applicable. Rule 601 provides the requisities and form of an originating summons; that is, so far as form is concerned, it "shall be in the form No. 79 or 80 in the appendix, with such variations as circumstances shall require." Rule 604 provides that the parties served with an originating summons shall, except as thereinafter provided, enter an appearance with the Local Registrar before they are heard. The form 79 is headed "General Form of Originating Summons," and that is the form to be used, unless the Rule or Act authorising the dealing with some special subject by originating summons directs that it is to be made returnable before a Judge in Chambers, as is provided in Rule 624. This application, I am of opinion, can be entertained under paragraph 8 of that Rule; and, therefore, the procedure is correct.

I had some doubt, however, whether I could allow it, because Alfred Perry Lockhart, the purchaser, is one of the administrators, and therefore a trustee for the next of kin and others interested in the estate in respect thereto. In order to pass a title, it would be necessary for him to join in the transfer; and; if he could not legally do so, the only title he could get would be from the two other administrators. That would leave him still a trustee, and would serve no purpose to vest the title in himself freed from the trust.

I have no power, so far as I can discover, to make a vesting order under paragraph 8 of Rule 624. (I assume that the certificate of title is at present in the name of the administrators as such.) I am informed on inquiry that the practice in all the land titles offices, in cases where a certificate of title has issued to an administrator or executor as such, and he happens to be the party or one of the parties beneficially interested in the property, is that, when the time arrives at which he is entitled to be clothed with the interest in his own name, to accept a transfer from the administrator

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or executor as such to himself personally or to himself personally and others, if there are others interested besides himself. It seems that this has been the practice since Re Galloway, 3 Terr. L. R. 88. I am not clear that that case went far enough to warrant the practice. But at the same time I am of opinion that I ought not to interfere with such practice, and possibly thereby unsettle a good many titles, after it has been followed for nearly fourteen years—at any rate when no person appears to question it.

There are eight next of kin of the deceased interested in the property, and they all, with one exception, have consented to the sale. Jessie Syme, a daughter of the deceased, refuses to do so. She was served with a copy of the originating summons. She did not appear at the return of such summons, nor did any person for her. I should judge, from a letter of hers attached as an exhibit to one of the affidavits used on the application, that she was attempting to hold the sale up to compel payment of an account against the estate with respect to which she had no legal claim, as practically admitted in her letter. I think the sale in question would be a most advantageous one in the interest of the estate and next of kin. The price offered for the property is $4,300 cash. The land is a quarter of a section, which is farm land. A partition among so many persons interested would leave such a small portion to each that it would be of very little present use, at any rate.

I have not lost sight of the fact that the purchaser being a trustee has no right to buy in the property without leave of the Court. I am of opinion that, although I am merely asked to approve of the sale, and that is all I can do, I may for the purpose of carrying the approval out order that the purchaser have leave to purchase the property.

The order will be, that I approve of the purchase; and that the purchaser, Alfred Percy Lockhart, have the right to purchase the property in question; and that the costs of this application be paid out of the estate.

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## SUPREME COURT OF CANADA.

DECEMBER 6TH, 1911.

### CANADIAN NORTHERN R. W. CO. v. ANDERSON.

*Master and Servant — Injury to Servant — Negligence — Dangerous Work—Dangerous Materials — Risk of Employment — Warnings and Instructions to Workmen—Incompetent Foreman—Employer's Liability—Damages —Limitation of Actions — Construction of Statute — Railway Act, R. S. C. 1906, ch. 37, sec. 306—"Construction and Operation" of Railway.*

Where instructions and warning are necessary to enable employees, in circumstances involving danger, to appreciate and protect themselves against the perils incident to the work in which they are engaged, it is the duty of the employer to take reasonable care to see that such instructions and warnings are given. The employer may delegate that duty to competent persons; but, where compensation is sought for injuries sustained by an employee owing to neglect to give such instruction and warning, the onus rests upon the employer to shew that the duty was delegated to a person qualified to discharge it, or that other adequate provision was made to ensure protection against unnecessary risk to the employees. The failure of the employer to take reasonable care in the appointment of a properly qualified superintendent, to whom the duty of selecting persons to be employed is intrusted, amounts to negligence involving liability for damages sustained in consequence of the acts of incompetent servants.

*Young* v. *Hoffman Manufacturing Co.*, [1907] 2 K. B. 646, applied.

In this case, as the risk incident to the employment of an incompetent foreman was not one of those which are assumed by an employee, the plaintiff was entitled to recover damages at common law.

The limitation of one year, in respect of actions to recover compensation for injuries sustained "by reason of the construction or operation" of railways, provided by sec. 306 of the Railway Act, R. S. C. 1906 ch. 37, relates only to injuries sustained in the actual construction or operation of a railway; it does not apply to cases where injuries have been sustained by employees engaged in works undertaken by a railway company for procuring or preparing materials which may be necessary for the construction of their railway.

*Canadian Northern R. W. Co.* v. *Robinson*, [1911] A. C. 739, applied.

Judgment of the Court of Appeal for Manitoba, *Anderson* v. *Canadian Northern R. W. Co.*, 21 Man. L. R. 121, 18 W. L. R. 124, varied.

Appeal and cross-appeal from the judgment of the Court of Appeal for Manitoba, Anderson v. Canadian Northern R. W. Co., 21 Man. L. R. 121, 18 W. L. R. 124, varying the judgment at the trial, by which the plaintiff's action was maintained with costs.

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At the trial, before CAMERON, J.A., with a jury, judgment was entered upon the findings of the jury in favour of the plaintiff for $7,000, assessed by the jury as damages at common law. By the judgment appealed from, the judgment entered at the trial was sustained except in respect of the amount of the damages awarded, which was reduced to the sum of $1,200, assessed under the Workmen's Compensation for Injuries Act, R. S. M. 1902 ch. 178. The defendants appealed as to the liability, and the plaintiff as to the amount of the damages.

The appeal was heard by FITZPATRICK, C.J.C., DAVIES, IDINGTON, DUFF, ANGLIN, and BRODEUR, JJ.

Wallace Nesbitt, K.C., O. H. Clark, K.C., and Christopher C. Robinson, for the defendants in the action.

J. B. Coyne, for the plaintiff in the action.

FITZPATRICK, C.J.C.:—The facts of this case are fully explained by Mr. Justice Duff, and I agree with him as to the general effect of the evidence. The fair inference from all that evidence is, that, by the exercise of reasonable care in the choice of their servants and appliances the defendants could have prevented or greatly decreased the dangers incident to the work in which Anderson was engaged, the thawing of frozen dynamite. The trial Judge, in his charge, clearly put the question of contributory negligence and of assumption of risk, the two main defences, to the jury; they found that there was no negligence on the part of the plaintiff and that he was ignorant of the danger to which he was exposed; and there is abundant evidence to support these findings. This verdict was subsequently, on appeal, set aside in part and judgment entered for $1,200 damages under the Workmen's Compensation Act. Hence the appeal and cross-appeal. I will deal only with the cross-appeal and the verdict awarding the plaintiff $7,000 damages at common law. I would have dismissed the main appeal without a word.

May I say it with all respect? The judgment of the majority in appeal is wrong, in my opinion, in that it fails to distinguish between the liability which attaches to the master in the case of an accident to a servant caused by the negligent act of a competent fellow-servant, and his liability



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for an accident which results from and is attributable to the employment of a fellow-servant who is incompetent. It must be accepted as settled law, under the English system, as I understand it, that the master is not responsible to his servant for an accident resulting from an isolated act of negligence of an otherwise competent fellow-servant: Cribb v. Kynoch Limited, [1907] 2 K. B. 548, approved of in Young v. Hoffman Manufacturing Co., [1907] 2 K. B. 646. But it is equally well-established by the authorities that the risk incident to the employment of an incompetent servant is not one of those which an employee assumes. If the injury could have been prevented by the exercise of reasonable care in the choice of his servants, and he fails in that respect, the master is liable. I can see no difference in principle between the liability which attaches in the case of an accident to his servant, due to the employment of an incompetent foreman, as was undoubtedly the case here, and that to which a master is subject in case he provides a defective piece of machinery for the purpose of that servant's employment. Whether the accident is due to a defective system or to defective machinery, the liability is the same.

In Johnston v. Lindsay & Co., [1891] A. C. 371, Lord Herschell, at p. 378, states the rule which, in my opinion, is applicable here: "It must be remembered that, whilst a servant contracts with his master to be at any risk of the negligence of his fellow-servants, there is, as has been more than once laid down, a corresponding duty on the part of the employer to take care to select competent servants; and it would be most unreasonable to hold that he is exempt from liability for his serious negligence in any case when he is not under this obligation."

The neglect of the master to exercise proper care in the choice of servants competent to perform the duties assigned to them, is, therefore, a source or cause of liability in the case of an accident properly assignable to that neglect. In other words, to make my meaning clear, I quite agree that no case of principle can be found in English law subjecting an individual to liability at common law for an act done without fault on his part; but it is equally certain that the master owes his servant the duty of reasonable care in the choice of his fellow-servants, that the "duty differs in degree with the nature of the employment and with the experience of the servant;" and for a breach of

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that duty there is liability. The degree of care required from the employer by the common law of negligence adopted as the basis of treatment of accidents of industry, when the mule and the spinning jenny were unknown, the canal boat and the stage coach the only means of communication, and men dug and delved by the exclusive aid of pick and shovel, must be determined by a different standard in this age of flying machines, motor cars, and dynamite. "Legal principles remain unchanged, but their application is to be changed with the changing circumstances of the times."

It occurs to me that there is another aspect in which the principle of legal liability involved in this case may be considered. The master must use all reasonable and proper precautions to safeguard his servant from dangerous conditions of his property, machinery, and tools; and it is certainly well-established by the authorities that the law takes notice that there are things which, in their nature, are so highly dangerous that, unless they are managed with great care, they are likely to injure people with whom they come into contact; and, while there is no disability on the master to utilise those dangerous substances for his profit and advantage in the prosecution of his work, there is a clear duty upon him to adopt every reasonable precaution which science and experience provide to reduce the risk of accident to the workmen who are obliged to handle them; and there can be no doubt that, on the evidence here, the defendants failed in that duty: Citizens Light and Power v. Lepitre, 29 S. C. R. 1. No advantage results from the use of unnecessarily harsh language, but the evidence of the foreman has left with me a most disagreeable impression. I deem it my duty to say this much. One can hardly conceive it to be possible that, in our day and in this country, so little regard is had for human life on the works of construction that are being carried forward in so many places, not only in mines, railroads, and factories, but in all the trades. The employment of such men as road-master Campbell in the general superintendence of work which involved at times the use of dynamite, a dangerous agency, of which he was totally ignorant, gives us an explanation of the enormous toll of life and limb levied on their employees by railway companies. The risks of modern industry necessarily incidental to the complicated conditions under which reasonable regard for efficiency and economy oblige men and

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women to labour, should not be increased by the employment of negligent or incompetent foremen. I trust this word of warning may serve to create a greater sense of responsibility on the part of corporations and other great employers of labour.

I was much troubled by the objection raised by the defendants as to the effect of sec. 306 of the Railway Act based on the Statute of Limitations; but, on the whole, I agree with the conclusion reached by Mr. Justice Duff. If this short statutory prescription is applicable to a case of common law liability—a point which I consider it quite unnecessary to decide now—at least it must be made abundantly clear that the facts bring the case clearly within the statute. On the evidence, it appears that the plaintiff was engaged in a pit at a place called Bird's Hill, distant from the main line of railway, digging sand, which was used for various purposes other than the construction of the railway. In this country, where the activities of railway companies are multifarious, should we hold this section applicable, for instance, to a workman in a stone quarry from which stone is being extracted to build a hotel intended to be used for the purposes of the railway? That is an extreme case, but it is by such cases that the applicability of a principle may be most effectively tested.

I would dismiss the main appeal and allow the cross-appeal with costs.

DAVIES, J.:—This appeal raises several important questions of law, upon which, I confess, I have had difficulty in reaching a satisfactory conclusion.

The plaintiff sued for damages sustained by him while blasting hard-pan with dynamite for the defendants in their quarry. He had been employed by one Campbell, a road-master in the defendants' employ, and the jury found, in reply to questions put to them, that the injuries he sustained were caused by the negligence of the defendant company, in "not employing competent men and not furnishing proper appliances and storage for explosives." They further found against contributory negligence on the plaintiff's part, and that the plaintiff's injuries "were caused by his ignorance of the material he was using."

Now, the material was frozen dynamite, which required to be thawed before being used to blast the hard-pan. The

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thawing of dynamite so as to use it for blasting purposes, unless carried out in what seems to be recognised as the proper way, is most dangerous work.

The trial Judge directed judgment to be entered, on the findings of the jury, for the damages found at common law. On appeal, the Court of Appeal, Chief Justice Howell dissenting, set aside that judgment and entered judgment for the smaller damages found under the Workmen's Compensation Act.

The defendants appealed from that judgment, on the ground that there was no evidence of negligence of the defendants or their employees which would justify the findings of the jury, and for which the company were responsible, and that in any event the claim was barred by sec. 306 of the Railway Act.

The plaintiff cross-appealed to have the judgment of the trial Judge for common law damages restored.

The substantive questions before us, therefore, are these two. Does the 306th sec. of the Railway Act apply to this case and bar the plaintiff's claim; and, if not, is there evidence to sustain the findings of the jury; and, if so, is the plaintiff entitled to recover the common law damages found, or is he limited to those awarded under the Workmen's Compensation Act?

As to the proper meaning and application of this 306th sec. of the Railway Act, I have entertained grave doubts. In the case of Canadian Northern R. W. Co. v. Robinson, 43 S. C. R. 387, I held the view that the acts there complained of, namely, the wrongful removal, in 1904, of the siding-track facilities which the complainant, Robinson, enjoyed, and the continued operation of the railway without these facilities until September, 1906, when they were restored by the order of the Board of Railway Commissioners, "were within this section and that damages resulting from the operation of the railway denying the complainant those rights were prescribed at the expiration of a year from the wrongful act of the railway company."

On appeal to the Privy Council, however, their Lordships held, [1911] A. C. 739, at p. 745, that the "operation of the railway" referred to in the section seemed to signify the process of working the railway as constructed. "The refusal or discontinuance of facilities for making a siding outside the railway, as constructed and connecting it with

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the line, does not appear to be an act in the course of operating the railway itself." It would appear, therefore, that, in their Lordships' opinion, these special provisions limiting the time of bringing actions of certain classes to a period of a year from the origin of the cause of action, do not apply to a case of refusing or discontinuing facilities on a siding such as were those in question, and that the acts covered by the section were only such as were done in the course of operating the railway itself. Applying the principle underlying that decision, it seems to me that operations carried on in a "borrowing pit" by the railway company's servants in obtaining sand for the ballasting of a railway are not within the terms "construction of the railway" as used in the section. To come within that section, the act or omission complained of must be directly connected with the actual construction of the road, and not indirectly or incidentally so connected.

It is manifest that some limitation must be placed upon the words of the section. "The construction of the road" can hardly be held applicable to work carried on by the company such as the manufacture of rails for the road or the procuring of ties for it from the woods; nor can I extend the construction of the section to the case before us, namely, the operations of blasting hard-pan in a pit, some distance, it matters not what, from the actual railway, for the purpose of obtaining sand for ballasting the road. I admit the difficulties surrounding the construction of the section; but, following what I understand to be the view of their Lordships of the Privy Council in the case of Canadian Northern R. W. Co. v. Robinson, I conclude that it must be confined to what would be deemed the actual construction of the road itself, and not extended to incidental or indirect or outside work or operations of the company in the obtaining or manufacture or procuring of material or plant to be used in such construction.

Having reached this conclusion, I pass to the next question, whether there is evidence to sustain the findings of the jury, and especially that one which says that the plaintiff's injuries were caused by the negligence of the company "by not employing competent men and by not furnishing proper appliances and storage for explosives."

I have carefully gone through the evidence, especially that of Campbell, the foreman, and the plaintiff, and am of the

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opinion that there was ample evidence to justify that finding. Campbell, according to his own evidence, knew little or nothing of the proper way to prepare frozen dynamite so that it might be used with safety as an explosive for the purposes required. He gave no instructions to the plaintiff, apparently because he felt himself not competent to give them. He may have been fully competent as a road-master pure and simple; but the duties he had to discharge involved the use of dynamite, sometimes frozen, in blasting operations, and he frankly confesses his own ignorance in the matter of thawing frozen dynamite, and his consequent failure or inability to instruct the plaintiff as to what he should do and what he should avoid doing in thawing out the dynamite. The plaintiff himself was found by the jury, on ample evidence, to have been "ignorant of the material he was using," that is, frozen dynamite, and the crude and ineffective efforts made by him first to improvise or construct a method of thawing the dynamite, and, on these efforts failing, in placing the sticks of dynamite under or alongside of a hot stove, is evidence, I think, not of recklessness, but simply of ignorance.

It was contended that, in any event, it was Campbell's negligence, in not applying to the company for proper materials to thaw the dynamite and in not fully instructing Anderson with regard to it, that caused the accident, and that, they being fellow-workmen, the doctrine of common employment covers the case and relieves the company of responsibility for damages caused by such negligence.

I agree that the parties stood towards each other in the position of fellow-workmen, and that at common law the company would not be liable to any of the workmen standing in that relation for injuries caused to them by such negligence of Campbell, assuming his competency for the discharge of the dangerous duties intrusted to him to have carried out. But, as I find ample evidence to justify the finding by the jury of his incompetence to instruct those under him as to the proper way and method of thawing dynamite and as to the danger of attempting to thaw it in the fatal manner Anderson in his ignorance followed, I cannot accept the conclusion that the company are absolved from liability.

I find the evidence of Campbell's incompetence with respect to this special class of dangerous work which Ander-

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son, uninstructed, was ordered to carry out, in Campbell's own confession of ignorance with regard to the handling and thawing of frozen dynamite.

The majority of the Court of Appeal for Manitoba based their judgment upon the absence of any such evidence.

The question then is, for me, reduced to one of the onus of proof as to the discharge by the company of their duty. That duty is, as laid down by the Court of Appeal in two late cases of Cribb v. Kynoch Limited, [1907] 2 K. B. 548, and Young v. Hoffman Manufacturing Co., [1907] 2 K. B. 646, to give the necessary and proper instructions to young or inexperienced or ignorant workmen employed by them in dangerous work, to guard against preventable dangers or accidents; but such duty is one which the company or employer may delegate to a competent foreman, and the negligence of the foreman is a risk which the fellow-servant takes upon himself.

The foreman, however, or person to whom such duty is delegated must be a person competent rightly to discharge the duty. If that competency is proven, then the employer's duty is discharged, even where the delegate fails through neglect in the discharge of the delegated duty.

But, in the case of delegation to an incompetent foreman (by intermediate superior officers of the company, who were, themselves, not shewn to be incompetent), as in the case now under consideration—does the onus lie upon the workman injured and suing for damages of disproving their competency also; or has he discharged all the law requires of him, prima facie, when he proves incompetency on the part of the official whose negligence caused the injuries for which compensation is claimed? In my opinion, on every ground of reason, and, I venture to think, of authority also, the latter is and should be the law. It it is not so, then mere appointment will imply competency, and an onus will be cast upon injured workmen which in most cases it will be quite impossible for them to discharge. The law casts the duty upon the employer, whether a person or a company, of taking due and proper care in the appointment of his or their officers. That is all. The appointee may turn out to be quite incompetent, but that result throws no liability upon the company, if it is shewn that due and proper care in his appointment was taken.

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When the workman proves incompetency, on the part of a subordinate foreman, resulting in the injuries he complains of, he makes, in my humble opinion, a prima facie case, and throws the onus on the company of proving affirmatively that they have discharged the duty the law casts upon them; but which they have elected to delegate. That duty, when delegated, is only discharged by delegation to competent persons; and it is not an absolute duty warranting competency on the part of the appointee; but is satisfied by shewing due and proper care in its exercise. The appointment, however, of an incompetent officer gives rise to the presumption that due and proper care was not exercised in his appointment. I gather that to be the opinion alike of the Master of the Rolls, at p. 657, and of Kennedy, L.J., at p. 659, of the report of the case of Young v. Hoffman Manufacturing Co., [1907] 2 K. B. 646. The same opinion is expressed with convincing reasoning by Palles, C.B., in Skerrit v. Scallan, Ir. R. 11 C. L. 389, at p. 401, and is called the "better opinion" by Mr. Beven in his book on Negligence, Can. ed. (1908), at p. 648.

In the present case, we have the necessary findings: incompetence of Campbell, who employed the plaintiff; absence of proper instruction in the thawing of the dynamite; and absence of contributory negligence by the plaintiff. These findings cast upon the defendant company the onus of proving the exercise of due and proper care in Campbell's appointment. That onus was not discharged simply by proof that Campbell was appointed by an intermediate officer. There still remained upon the company the duty of proving either that due and proper care had been exercised in the appointment of such officer, or that he was a man fully competent to discharge the duties delegated to him.

My opinion, therefore, is to dismiss the main appeal, allow the cross-appeal, vacate the judgment of the Court of Appeal, and restore that of the trial Judge, with costs to the plaintiff in all the Courts.

IDINGTON, J.:—The limitation of action contained in sec. 242 of the Railway Act certainly does not seem to have much to do with an action of negligence in operating, long after construction of the railway, works in a sand-pit. The only change made in amending the old Railway Act was to make the amended section conform to the interpretation the Courts had put on that section.

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I do not think the long struggle over that should now be given a new starting-point to run it over again. I see no ground on this or any other point taken for allowing the appeal.

As to the cross-appeal, I think it ought to be allowed.

The law, as laid down by Lord Cairns, in Wilson v. Merry, L. R. 1 H. L. Sc. 326, seems strangely forgotten in many places. I have no doubt there exists a very wide if not an entire disregard of the terms upon which masters are there held to be absolved from a personal discharge of the duties they owe to their servants. Lord Cairns, at p. 332 of the report of that case, stated as follows: "The master has not contracted or undertaken to execute in person the work in connection with his business. . . . But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do, and furnish them with adequate materials and resources for the work. When he has done this, he has, in my opinion, done all that he is bound to do; and, if the persons so selected are guilty of negligence, this is not the negligence of the master."

The master's duty in the premises existent herein was to instruct, to warn, and to protect, when setting his men at a dangerous employment.

The defendants chose to substitute for themselves, to discharge these duties, a man about as ignorant of dynamite, its dangers, and the proper means for avoiding and averting them, as any man could be in these later times, when the destruction it has wrought, largely through incompetent foremen, has awakened the dullest of men.

The company knew all these things so well that they properly paid an extra wage for the higher degree of skill needed at this work than the ordinary workman possesses.

The foreman selected does not seem to have so realised even what that meant as to be put on inquiry or to get such men.

The jury has found herein, and, to my mind, would have failed to discharge their duty if they had not found herein, that the man in charge superintending and directing the work in question was incompetent.

He never should have been for an hour permitted to hold his position, when the conditions of operating had

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become such that the work to be done involved a superintending for which he had never been fitted. He had, by reason of changed conditions, become, if ever fit, then unfit.

I think it unnecessary to pursue the subject further. The evidence quoted by Chief Justice Howell makes it clear that the jury had ample ground to find as they did; and the reasons he assigned need not be repeated here. I agree therein.

I think the appeal should be dismissed with costs.

I think the cross-appeal should be allowed, with costs throughout, and that the judgment of the learned trial Judge should be restored.

DUFF, J.:—In this case I am to deliver the judgment of Mr. Justice Anglin and myself.

The defendants appeal from the judgment of the Court of Appeal for Manitoba holding them liable to the plaintiff in the sum of $1,200, assessed by a jury as damages under the Workmen's Compensation Act. At the trial, the jury made findings which, in the opinion of the trial Judge, entitled the plaintiff to recover at common law; and he accordingly entered judgment for the sum of $7,000, the damages assessed by the jury on the basis of common law liability. This judgment the plaintiff by a cross-appeal seeks to have restored.

The findings of the jury, in so far as they establish liability of the defendants under the Workmen's Compensation Act, on the ground that the plaintiff's injuries are properly attributable to the negligence of road-master Campbell, and not to his own blameworthy departure from such instructions as Campbell gave him, cannot be disturbed. They are supported by evidence upon which a jury might properly act.

The defendants also seek to escape liability under the limitation provision of sec. 306 of the Railway Act, the action having been brought more than a year after the plaintiff was injured. Although, in one sense, the injury complained of was sustained by the plaintiff "by reason of the construction" of the defendants' railway, it was not so, in our opinion, within the meaning of those words as used in sec. 306 of the Railway Act. The plaintiff was engaged in the work of procuring or preparing materials for the construction of the railway rather than in the work of con-

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struction itself. If the section of the Railway Act relied upon should be held applicable to such a case as this, it is difficult to perceive what limits should be placed upon its application, when the railway company themselves undertake the procuring or manufacturing of materials, of whatever kind, requisite for the construction of its works. Having regard to the recent decision of the Judicial Committee, affirming the judgment of this Court in Canadian Northern R. W. Co. v. Robinson, [1911] A. C. 739, 43 S. C. R. 387, we think it is reasonably clear that an injury sustained under circumstances such as those of the present case is not within the purview of sec. 306.

We have not overlooked the argument of counsel for the plaintiff, although it was based on evidence somewhat meagre, that, because gravel taken from the pit in question by the defendants was sold or given to contractors to be used for purposes not connected with the railway, or the works which it includes under the statute, the pit itself cannot be deemed to have been part of the railway, and that it is not established that the material for the taking out of which the plaintiff was preparing when he was injured, was intended to be used upon or in connection with the railway. But, in the view we have taken of the purview of sec. 306, it is unnecessary to determine these questions; and, because of the unsatisfactory character of the evidence, it seems undesirable to do so if it can be avoided.

It follows that the defendants' appeal should be dismissed with costs.

The cross-appeal raises quite another question.

The plaintiff was injured by an explosion of dynamite, at Bird's Hill, Manitoba, when in the employment of the defendants. In the course of removing sand from a sandpit with a steam shovel, in September, 1907, a party of the employees of the defendants encountered a bed of hard-pan, which proved intractable to ordinary methods, and had to be broken up by means of dynamite. The party was subject to the orders of one Campbell, a road-master of the defendants, who, having procured some dynamite from some persons engaged in taking sand and gravel from an adjacent gravel pit, directed the plaintiff (according to his evidence) to take charge of the operation of blasting. To this the plaintiff (accepting his own account) objected, protesting his ignorance of dynamite and inexperience in the manipula-

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tion of it. The road-master (still following the plaintiff's story) then peremptorily ordered him to proceed with the blasting (telling him that he would be dismissed if he did not), and advising him, at the same time, to consult one of the workmen engaged in the neighbouring pit as to the proper method of handling it. The plaintiff says that the person to whom he was thus referred was unable to give him any instructions except to shew him how to connect the fuse with the explosive; but that, being face-to-face with the alternative of obeying orders on the one hand and dismissal on the other, he chose the former and proceeded as well as he could with the work he had been directed to do. In mid-October, the plaintiff left the employ of the defendants; but, in the last few days of that month, was again engaged to work in the defendants' yard at Winnipeg, by Campbell, who, a day or two afterwards, directed him to proceed to Bird's Hill to resume the work of blasting, telling him at the same time that he must thaw the dynamite —which would be frozen. This the plaintiff (who, according to his own story, had no experience and no knowledge of the proper or usual method of thawing dynamite) first attempted by a process (it is unnecessary to describe it) which, according to the evidence, proved to be altogether too dilatory, and afterwards by placing the sticks of dynamite (on end) around a stove in a box car which the party was using. An explosion resulted, killing one person and destroying the plaintiff's sight. The action was brought to recover damages, on the ground that this explosion was due to negligence for which the defendants are responsible. The jury acquitted the plaintiff of the charge of contributory negligence, and found negligence against the company in two respects—"by not employing competent men, and by not furnishing proper appliances and storage for explosives." They also found as follows: "(5) If the injury was so caused by the negligence or improper conduct of any person having superintendence over the plaintiff, did the defendants use reasonable and proper care and caution in the selection of such person for the position he occupied? A. No."

The question on the cross-appeal is, whether there is or is not evidence which, in law, is sufficient to support these findings.

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"It does not appear to me to admit of dispute that at common law," said Lord Watson in Smith v. Baker, [1891] A. C. at p. 353, "a master who employs a servant in a work of a dangerous character is bound to take all reasonable precautions for the workman's safety." In the same case Lord Herschell said, at p. 362: "It is quite clear that the contract between the employer and the employed involves on the part of the former the duty . . . so to carry on his operations as not to subject those employed by him to unnecessary risk."

It is a corollary from these principles that, where warning and instruction are necessary to enable persons employed in circumstances involving danger to appreciate and protect themselves against the perils incident to the duties in which they are engaged, it is the duty of the employer to take reasonable care to see that such warning and such instruction are given.

On the evidence adduced in this case, the jury were clearly entitled to find that the plaintiff was without experience or knowledge of the process of thawing dynamite; and that, a workman, thus ignorant and inexperienced, having had the work of thawing dynamite assigned to him, it would be a precaution obviously necessary for the protection of the workman himself, as well as of his fellow-employees, to see that, before undertaking the operation, he was properly informed as to the risks attending it and instructed as to the best methods of avoiding or diminishing those risks. The jury were, moreover, entitled to say that the obligation to take reasonable care to see that such information and instructions should be given, involved the duty (if no other adequate steps to that end were taken) to see that the official who was charged with the responsibility of selecting persons to be intrusted with work such as that assigned to the plaintiff should be a person competent to discharge the obligation. There was ample evidence to shew that Campbell, the road-master, was not qualified in this respect, and that no steps had been taken, by the superintendent who appointed him, or otherwise, to ascertain whether he did or did not possess such qualification. In these circumstances, the real question for determination appears to be this: on the evidence in this case, can the company properly be held responsible for the lack of instructions found by the jury to be due to the failure to take

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proper care in respect of the appointment of the official charged with selecting persons to be intrusted with the duty of thawing dynamite?

We think the decision of the Court of Appeal in Young v. Hoffman Manufacturing Co., [1907] 2 K. B. 646, is authority for the proposition that, once it is shewn that an employee has had assigned to him work of a character such that a duty arises on the part of the employer to take reasonable care before permitting him to undertake it, to see that he has the necessary knowledge and experience to protect himself from injury in the course of it, and it further appears that the employee (being incompetent in that respect) has been permitted to enter upon his duties without any steps having been taken, in fact, to ascertain his competency—those conditions being satisfied. it lies upon the employer to establish to the satisfaction of the jury that he has committed the duty referred to to some competent delegate or has made some other adequate provision for fulfilling it.

In the case just mentioned, the material facts are stated at p. 646 of the report as follows: "The plaintiff, a boy of fifteen, was injured through his arm being caught by a circular saw while working in the defendants' engineering works. The jury found that there was negligence on the part of the defendants in not sufficiently instructing the plaintiff in the working of the machine. They found that the foreman, to whom the duty of instructing the plaintiff was delegated by the defendants, had not fully instructed or cautioned the plaintiff. The defendants at the trial desired to raise the defence that they were not liable to the plaintiff for the negligence of their foreman, which was not their negligence. Ridley, J., declined to allow this point to be taken, on the ground that it was not pleaded, and gave judgment for the plaintiff. The defendants appealed." The principles applied in that case are stated, at p. 659. by Kennedy, L.J., in these words: "If it be the duty of the employer, in order that he may discharge his obligation to use reasonable care in order to prevent injury to his servant in handling the machinery upon which the servant is employed, to instruct him as to the safe and proper method of working, may that duty be discharged by delegating the business of instruction to a competent person—call him foreman or overlooker or what you will—so

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that, if an injury happens to the servant from the failure of the delegate to give any instruction, or adequate and proper instruction, the negligence causing the injury is, in point of law, the negligence, not of the master, but of the foreman or overlooker, who is a fellow-servant with the injured person? I agree with the Master of the Rolls that the contractual duty of the master to instruct may be discharged in this manner; and, further, that such delegation may be either an express delegation or implied as a part of the known and recognised duties of the delegate—whether styled foreman or overlooker or anything else—in the course of his service. Whether in the particular case such delegation, either express or implied, existed; whether the directions of the employer, if expressly given to the delegate, were sufficiently precise and explicit; whether the delegate was or was not competent to understand and to fulfil the delegated duty—all these, just as in the case where the employer gives instruction personally or by written or printed notice, the adequacy of such personal direction or of the notice, are matters proper for the consideration of the tribunal which, whether Judge or jury, has to decide the issue of fact upon which depends the question of the fulfilment or non-fulfilment of the employer's duty to use reasonable care to avert danger to his servant employed about the machinery, and consequently the question of his liability or non-liability for the injury to the servant." At the conclusion of his judgment at p. 651, the Master of the Rolls says this: "In my opinion, the case must go down for a new trial. If it is established that a competent foreman was employed by the defendants, whose duty it was, either by reason of express directions or by reason of directions implied from the nature of his employment, to give proper instruction, regard being had to the plaintiff's age and other circumstances, the defendants will not be liable for the omission of the foreman to give proper instruction. Unless this is established, the defendants will be liable, assuming that, as in the first trial, contributory negligence on the part of the boy is negatived."

In effect the decision of the Court is, that the duty referred to may be delegated; but, it having appeared that —whether through default on the part of the employer or default on the part of the delegate—the thing which it was somebody's duty to do for the protection of the workman

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has not been done, then the employer, in order to discharge himself, must shew that the default is not his default.

Here the plaintiff has carried his case one step further forward and has proved (as the jury have found) that the lack of instructions to him was due to absence of care in respect of the appointment of his superior. On the principle above mentioned, the burden of shewing that for this absence of care the defendants are not responsible is cast upon them. We have not overlooked the fact that, in the course of the plaintiff's case, Campbell was shewn to have been appointed by Wilcox, the divisional superintendent. The passage quoted from Kennedy, L.J., makes it quite clear that, in such circumstances, the employer must satisfy the jury that he has done all that can reasonably be asked of him, and that the neglect of duty leading to the injury complained of was that of an employee for whose negligence he is not responsible. It appeared, indeed, in Young v. Hoffman Manufacturing Co., as the statement of facts above cited shews, that the duty of giving instructions had been delegated, and, nevertheless, it was held to be a necessary part of the employer's defence to shew that the delegate was competent.

The cross-appeal should be allowed with costs.

ANGLIN, J., agreed with DUFF, J.

BRODEUR, J.:—I agree with the views expressed by the Chief Justice.

The main appeal should be dismissed and the cross-appeal maintained with costs.

*Appeal dismissed with costs; cross-appeal allowed with costs.*



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## SUPREME COURT OF CANADA.

DECEMBER 22ND, 1911.

## ANDERSON v. MUNICIPALITY OF SOUTH VANCOUVER.

*Assessment and Taxes—Meetings of Municipal Council—Court of Revision—Transacting Business outside Limits of Municipality—Place of Meeting—Revision of Assessment Rolls—By-laws—Sale for Arrears of Taxes—Construction of Statutes—55 Vict. ch. 33, sec. 83 (a) (B.C.) —R. S. B. C. 1897 ch. 144—Statutory Relief—Estoppel —Acquiescence—Laches.*

*Held, per* FITZPATRICK, C.J.C., IDINGTON and ANGLIN, JJ., that, prior to the amendment of the British Columbia Municipal Act, 1892, by the Municipal Amendment Act, 1894, 57 Vict. ch. 34, sec. 15, municipal councils, subject to those statutes, had no power to hold meetings for the transaction of any administrative, legislative, or judicial business of the municipal corporation, at a place outside of the territorial boundaries of the municipality.

*Held, per* FITZPATRICK, C.J.C., IDINGTON, DUFF, and ANGLIN, JJ., that Courts of Revision, organised under the British Columbia municipal statutes, have no power to exercise their functions as such except at meetings held within the territorial limits of the municipality where the property, described in the assessment rolls to be revised by them, is situate.

Section 15 of the Municipal Amendment Act, 1894, inserted in the Municipal Act, 1892, a new provision, sec. 83 (*a*), as follows: "All meetings of a municipal council shall take place within the limits of the municipality, except when the council have unanimously resolved that it would be more convenient to hold such meetings, or some of them, outside of the limits of the municipality:"—

*Held*, BRODEUR, J., dissenting, that there was no proof of such a unanimous resolution as the statute requires.

The council of the respondent municipality, without any formal resolution, as provided by the amended statute, held its meetings during several years at a place outside the limits of the municipality, and organised Courts of Revision there. These Courts held all their meetings at the same place as the council, and assumed to revise the municipal assessment rolls at those meetings. The council approved the rolls so revised, and enacted by-laws, from year to year, levying rates and authorising the collection of taxes on the lands mentioned in the rolls, and, after notice as provided by the statutes, sold lands so assessed and alleged to be in arrear for the taxes so imposed:—

*Held*, BRODEUR, J., dissenting, that the assessment rolls were invalid, that the by-laws levying the rates and authorising the collection of taxes on the lands mentioned therein were null and void, and that the sales of the lands so made for alleged arrears of taxes were illegal and of no effect.

*Per* DUFF and ANGLIN, JJ. (BRODEUR, J., contra), that the default in payment of taxes, by the appellant, and his subsequent inaction and silence, while aware of the fact that his lands had been sold for alleged arrears of taxes, did not disentitle him from taking advantage of the statutory procedure respecting the contestation of sales for arrears of taxes, either by estoppel, acquiescence, or laches.

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**The provisions of sec. 126 (3) of the Municipal Act, 1892 (now R. S. B. C. 1897 ch. 144, sec. 86 (2)), have no application to invalid by-laws enacted by municipal councils on occasions when they cannot perform legislative functions.**

**The judgment of the Court of Appeal for British Columbia, 18 W. L. R. 373, was reversed (BRODEUR, J., dissenting, on the ground that, as the council had held its first meeting in each year within the limits of the municipality and adjourned for the purpose of holding its next meetings at the place outside of the municipality where all other meetings were held, the by-laws approving of the assessment rolls and those levying rates and authorising the collection of taxes were valid and the sale of the lands in question for arrears of such taxes was legal and effective).**

Appeal by the plaintiff from the judgment of the Court of Appeal for British Columbia, 18 W. L. R. 373, affirming the judgment of CLEMENT, J., at the trial, 13 W. L. R. 226, by which the action was dismissed with costs.

The plaintiff impeached the sale of certain lands, in which he claimed an interest, purporting to have been made by the municipality for alleged arrears of taxes; the other defendants claimed the lands through the tax-sale purchaser, to whom the alleged tax-sale deed had been delivered in due course.

The appeal was heard by FITZPATRICK, C.J.C., IDINGTON, DUFF, ANGLIN, and BRODEUR, JJ.

A. H. MacNeill, K.C., for the appellant.

J. S. Ewart, K. C., for the respondent Ralston.

W. H. D. Ladner, for the respondent Fleming.

IDINGTON, J:—The appellant rightly contends that the respondents, setting up a tax title, must shew that each step taken to impose the taxes in question, and to sell the land in question, has been in conformity with the statutory powers given for such purposes. Indeed, this does not seem to be denied. Nor does it seem to be seriously denied that in several instances there exist departures from the mode pointed out by statute for doing what was done; but the respondents excuse them either by asserting that they were in respect of unimportant matters or merely directory provisions, or that they have been cured by statutory provisions applicable thereto, or that the appellant, by reason of his failure to assert his claim earlier, cannot now be heard to complain; and that, in any event, these errors were each and all merely irregularities, and did not result in producing nullities.

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The gravest of all these infractions of law is the entire disregard during the years in question, being 1893, 1894, 1895, 1896, and 1897, for which the taxes were claimed, by the Courts of Revision, of the proper place to hold their sittings, and almost equal disregard during the same time by the council of the proper place to hold its sittings.

The usual necessary proceedings, by way of by-law or resolution of the council, or resolution or other act of the Courts of Revision, upon the respective validity of which must rest the imposition of these taxes and of the council's acts founding and authorising the sale of the land to enforce the same, were each and all transacted at meetings held outside the limits of the municipality.

If these proceedings, or any one of them, were null, then I think the sale must be held void.

The municipality was incorporated in 1892, and derived its powers from, and was thenceforward subject to, the provisions of the Municipal Act of 1892, of which sec. 103, defining the jurisdiction of municipal councils, is as follows: "103. The jurisdiction of every council shall be confined to the municipality the council represents, except where authority beyond the same is expressly given."

It has been said that this is merely objective. In a sense that is true, but it does not cover the whole truth. If nothing else had been enacted, and the council had bought (as an exercise of a power clearly given to erect or procure a town-hall for corporate use) a hall outside the municipality's limits and sought to constitute that the municipal town-hall and seat of the corporation's business, does any one suppose they could have levied a rate to pay therefor? Or from the strictly objective point of view, could the council have acquired title to this land outside the limits of the municipality?

I had always supposed that such councils could not, except where expressly authorised by statute, buy a foot of land outside the municipal limits, for a graveyard, or a sand-pit, or a toll-bar, or anything else, no matter how urgently needed. If the councillors, or reeve and councillors, of such a municipality had done so, I have no doubt that they could have been personally made to return into the municipal treasury its funds so used. If they could not buy, no more could they rent. Indeed, the power of acquisition, outside the municipal limits, was actually given later for some of

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these specified purposes, but none to acquire town-hall or seat or home for the council to use.

The discharge of their duties at home, in some chosen seat there, is implied in the legal history of such corporations; and, in reading the language of statutory enactments creating them or empowering them, such history must be duly regarded. Thus read, both sense and colour or a shade of meaning are given to the language of restriction just quoted. And along with that there must never be disregarded the oft-repeated legal principle that corporations, being but the creatures of statute, have no power but what the statute has given; and much less has the council or other body which the statute gives and directs as a means of corporate activity.

The presumption is entirely in favour of the legislative or administrative acts of such a corporation being confined within its territorial limits, unless where, by reason of some necessary implication requiring it in order to enable it effectually to discharge the duties its constituent Act has cast upon it to do, something must be done beyond such limits.

On the 7th May, in the year 1892, the council then in office held a meeting within the municipality's limits, at which a resolution was carried "that the next meeting be held at the office of Shannon and McLaughlin on the 21st inst. at 1 p.m." This place was in Hastings street, in an adjoining municipality.

It thus began a long course of illegal conduct. Of that I have not a shadow of doubt. The only doubt I have in that regard is whether illegal acts so done were nullities or mere irregularities.

The council had to appoint the assessor; and, when he had done his work, had to constitute a Court of Revision, by naming five of its members, if more than five, to be the Court of Revision. This council consisted of a reeve and five councillors.

The language of the Act then in force is not as clear as it might be. It provides apparently for the council revising the roll; but that, being read in connection with other sections, I think merely means that it shall see that that duty is discharged by the methods given in the Act, which consist of the council constituting a proper Court, and, as provided by sec. 157, appointing a time and place for the hearing of all complaints against the assessment.

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It will be observed that this power seems to indicate a power to name a place. Does that enable it to name a place outside the municipality for holding a Court of Revision? I think not. The nature of the Court, the duties it has to discharge, the nature of the complaints to be heard and means of hearing and adjudicating upon them properly, as well as facilities furnished for the members of the Court and for those concerned being in attendance with witnesses for whom no conduct money was to be allowed, but only a per diem allowance, all seem to forbid the thought of the Court being held outside of the limits of the municipality; for, if it could go a mile beyond, it could go twenty or more. And, when the council is given power to name the place, of which notice has to be published, it must be held to be bound to name a place within the said limits.

But, in each year in question, these appointments of persons to form the Court and naming a place and time for their doing so were all directed by a council sitting outside its jurisdiction. Until the statute was changed, such meetings could have no authority, and then only on complying with the conditions precedent to such authority, as given in later years of the period in question, to enable them to hold such sittings. This condition never was complied with. Hence their appointment of the members to hold the Court and their selection of a time and place for its sittings were all illegal.

The next duty falling upon the council was to receive the roll and see that it had been duly revised and certified. Anything done in this regard was done in the same illegal fashion. And the rate by-laws all seem to have been passed, in the like disregard of the law, at sittings outside the municipality's limits; unless in the later years, when the Act was changed, to which I will presently refer, we can presume authority.

In 1897, the council, from a resolution which I accidentally notice, seems merely to have directed the clerk to advertise the time, and possibly did so in other years.

An attempt was made in argument to shew that, as the council and Court of Revision consisted of the same members, the power given by legislation to the council on so resolving to fix meetings outside it, impliedly rested thereby in the Court of Revision. But this is an error of fact, as well as law, for the council consisted of six members, and this Court of only five of them.

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The Courts of Revision in question all sat outside the municipality. They are supposed to be Courts of justice, but to try thus to enable the members thereof to sit outside the jurisdiction given them seems to be something very like constituting Courts of injustice.

I know not how it operated in the peculiar circumstances of this municipality, nor do I, as a matter of law, here need to care. But I am quite sure that to sanction, as legal, such a proceeding as the constitution of these Courts by such methods, and the giving of directions involved in the council's fixing a place outside their jurisdiction as the only one for them to sit, would be fraught with danger to our municipal systems, which are nearly all, in their main features, and especially in this regard, after the same pattern.

To hold such a thing legal would be, in the results, intolerable. To hold it a mere irregularity would be to open the door to reckless spirits, of whom there exist only too many willing to take the risk. Indeed, our admirable municipal systems depend on all such men being sharply taught law and order.

In this connection I may say that, if any one who had made a study of our whole frame of government were asked to point out in what single feature it is most distinguishable from all forms that have gone before, he would put his finger on the distribution and decentralisation of its powers and the localisation thereof so as to bring each part, in such measure as may be practicable, as near to the people to be served as it is possible to do.

Such is the spirit of our frame of government, and of the municipal part thereof especially. It would be grossly violating it to enable any bare quorum of five or six busy or lazy men to throw aside the law.

Courts of Revision framed after this pattern were, from experience in Ontario, found possible of improvement.

The weakness of the pattern need not be intensified by countenancing such a departure from law and custom as the respondents try to maintain here.

Let us look at the powers given for summoning witnesses and getting documentary and other evidence before such a Court sitting where it never was intended to sit. How could it be enforced, or he suffering from disobedience of the witness get relief?

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On the 11th April, 1894, the council was given a power it had not hitherto possessed by the enactment of the following:—

"The Municipal Act, 1892, is hereby amended by inserting the following as sec. 83A:—

"83A. All meetings of a municipal council shall take place within the limits of the municipality, except when the council has unanimously resolved that it would be more convenient to hold such meetings, or some of them, outside the limits of the municipality."

This, in 1897, by ch. 30, sec. 2, was replaced by the following: "28. All meetings of a municipal council shall take place within the limits of the municipality, except when the council have resolved that it would be more convenient to hold such meetings, or some of them, outside the limits of the municipality."

The council of the municipality in question never acted on either of these provisions. Legislators might doubt, but this council was undaunted. Their then clerk improperly seeks in his evidence to say that they did resolve; but, when challenged in cross-examination, he is forced to admit that the minute-book contains all the resolutions; yet no such resolution exists but the one of 1892, above quoted, and which could have no relation to this new power. We are asked to presume that they did, though it nowhere appears on the record which they were bound by statute to keep and permit any one to inspect.

Then we are asked to presume that it existed in the procedure by-law, which is not produced.

I find, since argument, in each of the first three successive years, a procedure by-law was passed, but none of them have been produced.

A curiously-worded provision exists in sec. 137, prohibiting a resolution or by-law of council from being in force for more than a year. I suspect that this (which was no doubt intended to restrain councillors, for a year, from trying improperly to bind their successors) gave rise to the succession of procedure by-laws; but why are none of them produced, or, if lost, why is the loss not proven and why are the contents not shewn by secondary evidence? It was incumbent on the respondents, if possible, to have proved thereby that acts done in such an unusual way had at least the sanction of such a by-law. Good faith, if nothing else, in this regard, made it desirable.

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An inspection of the minute-book, in order to see if it could give rise to a right to act on legal presumption, so far from helping me in that regard, destroys any possibility of my doing so. The book is, on the whole, well kept, and shews that the minutes of each previous meeting were read and confirmed or corrected, except in the case of minutes of special meetings, which were read along with those of the preceding regular meeting.

The provisions for the council's meeting outside the limits of the municipality were not intended to create or sanction such an abuse as the Court of Revision also doing so, but to meet emergencies which are easily conceivable. Indeed, I observe that in England the power of some councils meeting within or without its seat of jurisdiction has been given by the Municipal Corporations Act.

That sort of legislation tends to shew the supposed need of special enactment in that regard; and, if we can conceive of such an irregularity being tolerated there, possibly it prevents us from having judicial authority directly bearing on the point.

The Courts of Revision, however, are, when duly constituted, Courts of an inferior and essentially local jurisdiction, confined to that jurisdiction.

We are thus driven to answer the inquiry, whether or not the acts of these councils, and especially of these Courts, done whilst sitting beyond their territorial limits, must be held null.

Except the case of The Queen v. Inhabitants of Totness, 11 Q. B. 80, and the general principles laid down in Paley, we are not referred to authority. Relying thereon, it seems clear that the Courts of Revision could not act out of their jurisdiction, and acts so done must be held invalid.

The council had no authority to direct them to act elsewhere, though it may have presumed to do so; and hence I think its acts null, and, consequently, all that rested upon the same also null.

The assessment rolls never were duly completed. The act of ratifying them and constituting them legal, when once passed by the Court of Revision, has never operated. It only ratifies that supposed to have been done in the course of a due exercise of power.

All the other curative provisions are of no effect, for it was not competent for the council to do what followed.

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The competency of the council is a condition precedent to the application of the curative Acts invoked.

And, if we try to suppose there was a de facto Court of Revision, its acts beyond its jurisdiction are still null.

The analogy to be drawn from acts of a council improperly or imperfectly constituted, yet to be held valid because a council de facto, does not apply here. The Court of Revision, although constituted of some of the members of the council, is essentially another body, acting within its own right and powers, which it can neither limit nor extend, and over which, when constituted, the council has no power save that of naming a place for its sitting, which I have already dealt with and shewn must be a place where by law it could sit.

The council could, after the Act was amended, resolve to sit outside; but was never given power to direct its Courts of Revision so to sit.

The council never attempted, even when the law permitted it to exercise a power, to sit elsewhere. It is quite clear it did not try to do so on the few occasions it sat within the municipal limits. And when sitting outside, without such authority, it could not give itself authority for sitting there.

The case in many features is so curious that I tried to find light from many sources. I found that the acts of corporators, when not all summed and that in due form (and place being impliedly in question), as in the cases of Rex v. May, 5 Burr, 2681, Smyth v. Darley, 2 H. L. C. 789, Musgrave v. Nevison, 2 Ld. Raym. 1358, Rex v. Hall, 4 B. & C. 426, Rex v. Langhorn, 4 A. & E. 538, Rex v. Mayor of Liverpool, 2 Burr. 723, and others cited in these, were held null.

Incidentally, the meeting-place is only referred to as the proper or usual place, and seemingly essential part of the foundation on which to rest acts of a corporation as such. But in the Musgrave case, above, a case of meeting in a tavern, instead of the moot-hall, was held bad.

In the American municipal cases, there seems a dearth of precedent as to the place of meeting; and I have found only one case where the revising Court outside the municipal limits was the direct cause of holding taxes imposed void. The Supreme Court of Kansas, in Board of Commissioners of Marion County v. Baker, 25 Kans. 258, had the very point presented to it and held the sale void.

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Dillon, in sec. 264, or 505 of the 5th edition, refers to cases that imply that the doing so would be void; and Elliott on Public Corporations, 2nd ed., p. 171, cites substantially the same cases.

But in the larger field of private corporations there is abundant authority to shew that the corporation must not sit or attempt to act as such, outside its parent State, which is looked upon as its home, and limit of jurisdiction, and acts done elsewhere are void. See the cases of Miller v. Ewer, 27 Me. 509; Ormsby v. Vermont Copper Mining Co., 56 N. Y. 623, 625, and numerous like cases, where other authorities are cited, and the curious can trace out the law there in such regard.

Of course, some cases exist of directors being upheld in acting beyond the State, but that is put upon the ground that they are only agents of the corporation, and so within the leading case of Bank of Augusta v. Earle, 13 Peters 519, entitling corporations to act abroad in the sense there in question.

Of course, the analogy between the private and the public corporation is not close; but there is much less to be said or implied in favour of a local representative body going beyond its jurisdiction than for a business concern.

I think the appeal should be allowed with costs throughout.

FITZPATRICK, C.J.C.:—I entirely agree in the conclusion reached by my brother IDINGTON.

DUFF, J.:—The validity of the respondents' tax sale deed is impugned on the grounds: (1) that the conditions had not arisen under which alone the defendant municipality had lawful authority to sell the lands in question; and (2) that, in professing to sell them, the municipal officers acted without the sanction of a (legally effectual) by-law, by which alone they could acquire authority to make such a sale on behalf of the municipality.

The authority of the municipality to sell lands for the recovery of unpaid taxes, at the time of the sale which is here in question, was derived from sec. 50 (135) of the Municipal Clauses Act, R. S. B. C. 1897 ch. 144, which enactment is in these words: "50. In every municipality the council may, from time to time, make, alter and repeal

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by-laws for any of the following purposes, or in relation to matters coming within the classes of subjects next hereinafter mentioned, that is to say:— . . . (135) For the sale at public auction of land, or improvements, of real property, for all municipal taxes remaining unpaid at the date of the passing of such by-law: Provided there shall be taxes in arrears in respect of the said land, or improvements, or real property, for two years prior to the passing of the said by-law, and for providing for the municipality purchasing the real property when the price offered at such sale is less than the amount of arrears."

The sale was made ostensibly under the authority of a by-law alleged to have been passed by the municipal council in July, 1898. This instrument, purporting to be a by-law passed in exercise of the power conferred by the enactment quoted, professed to direct the collector of the municipality to prepare a list of "the lands or improvements or real property," upon which or in respect of which municipal taxes have been unpaid and in arrears for the space of three years prior to the passage of this by-law; and provided that, upon the list being duly authenticated by the reeve, and the reeve's warrant having been issued in that behalf, the collector should sell the properties included in it, in the manner therein prescribed. It is quite clear, therefore, that the authority of the collector to sell the property in question, as well as the authority of the council to authorise the sale, both rested upon the condition that there should be, at the time of the passing of the by-law, "taxes in arrears in respect of" it for a period of two years. The contention of the appellant is, that there were no taxes in arrears for such period, because the taxes due in respect of this property for the years 1891 and 1892 were paid, and no taxes were validly levied in respect of it in the years 1893, 1894, 1895, and 1896. It is not denied that, in form, such taxes were levied; but it is said that the meetings of the municipal council at which the proceedings essential to the validity of such levies took place were held outside the territorial limits of the municipality; and it is contended that such meetings were not permitted at all, or only under conditions which had not been complied with, and that anything done at them could not take effect as having been done in exercise of the legal powers of the council.

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Under the statute referred to, two requirements are essential to the lawful imposition of a tax in respect of the land: first, an assessment of the property—which is finally consummated only when the assessment roll prepared by the assessor has been passed upon by the council, sitting as a Court of Revision; and secondly, the passing of a by-law fixing the rate according to which the tax is to be levied. The assessment made in exercise of the statutory powers conferred upon the municipality, and the rate fixed by a by-law passed in exercise of those powers, are both elements which enter into and are essential to the constitution of a valid tax on real property.

I postpone for the moment the question whether it is now open to the appellant to impugn the validity of the parious proceedings in which the council or the members of the council professed to effect such assessments and to prescribe such rates for the years mentioned; the first point to consider being whether, assuming these proceedings to be open to attack in this action, the appellant's property was or was not, by virtue of them, lawfully subjected to the burden of the taxes alleged to have been thereby imposed. It is not disputed that the meetings at which these proceedings took place were held outside the boundaries of the municipality; and the first point to be determined is, what is the effect of that circumstance upon the legal validity of those proceedings? It is convenient to consider the proceedings in the years 1893 and 1894 separately from those which took place in the years 1895 and 1896. The statutory provisions under which the municipal council derived its powers for the first two years are to be found in the Municipal Act of 1892, which is ch. 33 of the statutes of that year. There is in that statute no enactment expressly dealing with the matter of the locality where the sittings of the council are to be held; and it does not appear to me to be necessary to decide whether or not it is a proper implication from the provisions of the Act that no sitting of the council for the effectual transaction of municipal business could be held except within the municipality; it appears to me to be clear that, at least when acting as a Court of Revision, it could not sit elsewhere.

Section 103 enacts as follows: "103. The jurisdiction of every council shall be confined to the municipality the council represents, except where authority beyond the same is expressly given."

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It seems to me to be indisputable that these words, when applied to the sittings of a Court of inferior jurisdiction, deriving all its powers from statute, must be read as limiting the area in which it can act in the exercise of its jurisdiction. One of the powers, for example, of the council, when sitting as a Court of Revision (sec. 165), as one would expect, is the power to summon witnesses and to take their evidence under oath. With reference to such a jurisdiction, what is the meaning of the words "the jurisdiction . . . shall be confined to the municipality?" I think the fair construction of this language is, that the jurisdiction is to be exercised not only for, but within, the municipality. The Act was amended in 1894, by an Act passed on the 11th April of that year; and, in respect of subsequent sittings of the council, it will be necessary to consider the effect of that amendment; but in the years 1893 and 1894 (the sitting of the Court of Revision in 1894 was held in February), the members of the council, while professing to perform the duty of passing upon the assessments for those years, were governed by the Act of 1892; and they were, I think, not exercising the powers in that behalf derived from that Act, for the simple reason that, in professing to do so, they were sitting outside the limits within which alone they could lawfully exercise those powers. For those years, therefore, no tax became lawfully leviable in respect of real estate, because there had been no valid assessment. In respect of the years 1895 and 1896, we must ascertain the effect of the amendment of 1894, which was as follows:—

"The Municipal Act, 1892, is hereby amended by inserting the following as section 83A:—

"83A. All meetings of a municipal council shall take place within the limits of the municipality, except when the council have unanimously resolved that it would be more convenient to hold such meetings, or some of them, outside of the limits of the municipality."

Before referring to the evidence bearing on the question whether the holding of the meetings of the council outside the municipality, in the years under consideration, can be justified by this enactment, it will be convenient to discuss what the enactment means by prescribing, as a condition of the legality of meetings so held, that the council shall have "unanimously resolved that it would be more con-

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venient," etc. Mr. Justice Clement thinks this provision does not require any act on the part of the council beyond the act of holding the meetings, coupled with unanimity of sentiment on the part of the members of the council that such a course is convenient; and that the existence of this unanimity of sentiment could be inferred from the fact that the meetings, as in this case, uniformly took place outside the municipality.

The Chief Justice of the Court of Appeal seems to take the same view. I think that view cannot be sustained. It is to be observed that what the statute requires is, not that the members of the council as individuals shall unanimously "resolve," but that the council shall "resolve." A "resolve" —to adhere to the words of the Act—by the council as a body is necessary. I do not think that a representative body in the exercise of legislative powers, whether plenary or subordinate, can "resolve" in a practical sense upon a matter such as that which the section deals with, without giving collective expression in some form to a decision upon it. I think it is clear that, before they can take advantage of this provision, they must, as a council, express a judgment that it is more convenient to hold their meetings outside the municipality, and they must express that judgment while professing to act as the council of the municipality and in circumstances in which the law permits them as the organ of the municipality to transact business.

It is beyond dispute that, if the council had, in that sense, passed upon the question of holding meetings outside the municipality, some record of their determination upon it ought to have appeared in the minute-book in which their proceedings were recorded (Municipal Act, 1892, sec. 97); and I have not the slightest doubt that it would have appeared there. There is no record of any action having been taken in that direction in 1895 or 1896 except the record of the adjournment of the initial meeting in each year. At each of those meetings the council adjourned to meet in Vancouver; but in either case nothing was said about subsequent meetings. These were held at regular intervals of a month, without a thought apparently of the provisions of the Municipal Act. I am not able to escape the conclusion that the proceedings which took place at these meetings could not in law take effect as the proceedings of the municipal council.

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It is said in one of the judgments of the Court below that the consequences of this construction condemn it. Now, when considering a legislative provision of doubtful meaning, the respective consequences of rival constructions, as these consequences may be supposed to have presented themselves to the legislature in passing the enactment, may, of course, properly be looked at; but that is a very different thing from saying that the actual consequences of a given construction in a particular case are necessarily conclusive or even relevant. The enactment in question was not framed with reference to the special circumstances of South Vancouver, but applied generally to the municipalities of British Columbia. If preponderance of convenience is to be a governing ingredient in passing upon the construction of the provision, then it is the general convenience we must consider. In this provision, be it observed, the legislature was prescribing a condition which, when complied with, was intended to have legal and practical consequences that might in some cases be of considerable importance; and, if considerations of general convenience are to be weighed, I should have thought the balance to be clearly in favour of the view that the legislation required not an unexpressed concurrence of sentiment merely, the existence of which might be incapable of direct proof, but some pronouncement or proceeding which, at least, should be susceptible of being ascribed to a definite occasion and of being noted in the public records of the council. The construction, indeed, for which the respondents contend must come to this in its practical operation, that the legislative requirement is satisfied if the members of the council as individuals consent expressly or tacitly to holding meetings outside the municipality. If that was what the legislature intended, it is not easy to see how the legislature could have avoided saying so. I do not think anybody wishing to enact a provision having that effect would have used the language we have to construe.

I may add that I do not see any good reason for thinking that sec. 83A does not apply to the sittings of the Court of Revision. As I read the Act, it is the council which exercises the judicial or quasi-judicial functions of the Court of Revision. When the number of the council for ordinary purposes exceeds five, then those who are to exercise those functions are to be nominated by the council as a

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whole, and, for the purposes of passing on the assessment roll, the council consist of the members so nominated. It appears to me to be clear that a sitting of the Court of Revision is properly described as a sitting of the council; and that all sittings of the council, whether for the exercise of legislative, administrative, or judicial functions, are within the purview of the provision in question. It is clear, however, if I am right in the views above expressed, that not only the assessment but the "rate by-laws" (so called) of the years 1895 and 1896 were never in operation; and it also follows that the by-law professing to authorise the sale in question (which was passed at a meeting held outside the municipality, and in the absence of any resolution, within the meaning of the statute, sanctioning such a course), was on that ground alone, apart from other grounds already mentioned, wholly without legal effect.

The next point is, whether, notwithstanding the absence of legal validity in the proceedings referred to, the appellant is precluded, by reason of certain statutory provisions from relying on the objections he raises. Clement, J., thinks he is precluded by sec. 126 (3) of the Municipal Act, 1892, R. S. B. C. 1897 ch. 144, sec. 86 (2), which continued in force until 1899. That section reads as follows: "In case no application to quash a by-law is made within one month next after the publication thereof in the British Columbia Gazette, and notice as provided in section 125 of this Act, the by-law, or so much thereof as is not the subject of any such application, or not quashed upon such application, so far as the same ordains, prescribes, or directs anything within the proper competence of the council to ordain, prescribe, or direct, shall, notwithstanding any want of substance or form, either in the by-law iteslf, or in the time or manner of passing the same, be a valid by-law."

In my judgment, this enactment applies only to by-laws passed by the council as a council on an occasion when it could lawfully transact business as the legislative organ of the municipality. It has, I think, nothing whatever to do with proceedings so fundamentally defective as those we have to consider in this appeal.

There remains the question whether the appellant has precluded himself by his own conduct from impeaching the proceedings and transactions in question. In considering



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that question, the character of the action and the circumstances out of which it arose are important The sale took place on the 6th October, 1908. On the 21st June, 1901, a deed was delivered to the purchaser. In October, 1906, an application was made for the registration of the purchaser's title, which remained in abeyance until 1908, owing to the fact that the purchaser's deed had not been acknowledged, as required by the Land Registry Act. In 1908, the appellant received a notice from the Registrar under ch. 31, sec. 3, statutes of 1901, requiring him to contest the claim to register the purchaser's title, within the time prescribed by the statute. Within the prescribed time, a caveat was filed by the appellant and an action commenced. This action was not proceeded with, but a second action (out of which this appeal arises) was begun some months later: the first action not being dismissed, but apparently remaining technically on foot until the present time.

I shall deal later with a point raised for the first time on the argument before this Court, that the second action was barred by the provisions of the statute last-mentioned. That enactment is as follows: "In case of applications under tax sales, the Registrar shall not take notice of any irregularity in the tax sale or in any of the proceedings relating thereto, or inquire into the regularity of the tax sale proceedings, or any proceedings prior to or having relation to the assessment of the land, but a certificate from the proper officer of the Government, or the municipality, shall be furnished, shewing the years for which there were taxes due and in arrear for which the land was sold at such sale, and the Registrar shall satisfy himself that the sale was fairly and openly conducted, and he shall also cause to be served upon all persons appearing by the assessment roll of the district in which the lands are situate, or by the records of the land registry office, to be the persons who, other than the tax purchaser or his assigns, are interested in such land, a notice requiring them, within the time limited by such notice, to contest the claim of the tax purchaser, and in default of a caveat or certificate of lis pendens being filed or in default of redemption, before the registration as owner of the person entitled under such tax sale, all persons so served with notice, . . . shall be forever estopped and debarred from setting up any claim to or in respect of the land so sold for taxes, and the Registrar shall register the person

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entitled under such tax sale as owner of the land so sold for taxes."

There is no provision here for the determination of the question in dispute by the Registrar of Titles; and it seems quite clear that either party, the applicant for registration under the tax sale or the contestant, could take proceedings to submit the question of title for judicial decision. I entertain no doubt that the Supreme Court would have jurisdiction to and would entertain a claim, on the part of either, for a declaration of his or her legal rights, without any demand for specific relief. In this case, it was the contestant who invoked the decision of the Court. He prayed for an injunction, but the substance of his claim was to have a declaration that his title ought to prevail over that of the applicant. His own title had not been registered, and the result of the action would determine whether the applicant or himself was to be registered as owner. I emphasise this for the purpose of pointing out that the appellant's action is not in substance a claim for equitable relief. It is an action occasioned and justified by reason of the situation created by the Act of 1901; and the substantial relief claimed is the special statutory relief of a declaration of rights. This latter is not equitable relief and not subject to the peculiar incidents of such relief: Chapman v. Michaelson, [1909] 1 Ch. 238, at pp. 242 and 243.

The rights, moreover, which the appellant asserts, are legal and not equitable rights. Prior to the tax sale, October, 1898, he was the undisputed owner of a legal estate in fee simple, as tenant in common with another, of the land in question. If the sale—by reason of the proceedings essential to its validity being ineffectual in law—was in itself inoperative, his title could not be affected by it. The sole question in the action is, whether the pretended sale had or had not any legal effect; and that question could have been raised in an action for the recovery of possession of the land as well as the present proceedings. Something was made of sec. 153 of the Municipal Act, 1896, which is as follows: "The deed to the purchaser of any land or real property sold under the provisions of any by-law passed under the authority of this Act, shall have the effect of vesting such land or real property in the purchaser, his heirs or assigns, in fee simple or otherwise, according to the nature of the estate or interest sold; and no such deed shall

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be invalid for any error or miscalculation in the amount of taxes or interest thereon in arrear, or on account of the property having been assessed as land. And the Registrar-General, or any District Registrar of Titles, as the case may be, upon production of the deed and application in the usual form, and upon payment of the usual fees, shall register or record the same in the usual manner."

This section, however, applies only where the sale has been made under a "by-law passed under the authority" of the Municipal Act. It can have no effect where in point of law there has been no by-law, and so we are again thrown back upon the question of the competence of the council to pass legally effectual by-laws while sitting outside the municipality. The appellant is, therefore, not a suitor seeking to enforce equitable rights or claiming equitable relief; and, consequently, laches in itself would not disentitle him from maintaining his action: Garden Gully United Quartz Mining Co v. McLister, 1 App. Cas. 39, at p. 57; Clarke v. Hart, 6 H. L. C. 633.

Has the appellant, then, by anything he has done or refrained from doing, precluded himself from alleging that the sale was in law ineffectual to deprive him of his property? In considering this point, it is, of course, to be presumed that, disregarding the statute of 1901, the sale in itself under which the respondent Mrs. Fleming claims was inoperative to affect the appellant's title. I shall assume also that the appellant knew of the sale in fact; and that he deliberately refrained from taking advantage of the provisions of the Municipal Act entitling him to redeem the property.

The reasoning on which the learned Judges in the Courts below proceeded appears to be this. The appellant paid no taxes from 1893 to 1898; he had notice of the proposed sale in 1898, and at that time he stated to the collector that he did not know whether the property was worth the taxes; that he came forward to dispute the purchaser's title only when the value of the property had become very much increased. Referring to these circumstances, the Chief Justice says: "Where there is, as I think there is here, conduct from which an abandonment of his property rights can with reasonable certainty be inferred, a Court of equity ought not to assist the plaintiff at the expense of innocent persons who have been guilty of no laches."

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I have pointed out that the appellant's action is not based upon equitable grounds, nor is the substantial relief claimed equitable relief; and we, consequently, have nothing to do with laches or with the principles upon which a Court of equity deals with suitors who are compelled to seek assistance of a kind which equity alone can give.

It is, perhaps, a little confusing to speak of a process by which the beneficial owner of a legal estate in fee simple in land becomes divested of his property, as "abandonment." Certainly, the intention, however deliberately formed, not to pay taxes and to permit his property to be sold for the payment of taxes, followed by the most absolute knowledge that it has been sold, will not of themselves suffice to vest it in a supposed purchaser at a tax sale if no taxes have in law become exigible in respect of it, and the sale itself is in law inoperative. The circumstances mentioned may be of great importance in shewing that the owner has by his conduct precluded himself from impeaching the proceedings resulting in the supposed sale; but, in themselves, they could never deprive the owner of his title.

The principle applicable to this branch of the case appears to be this. An owner of land in fee simple may be precluded by his silence or inaction from denying the authority of a third person to deal with his property, although this latter is a mere stranger and has no interest in the property and in law and in fact no authority whatever in respect of it; but in such a case inaction and silence in themselves are not sufficient to deprive the owner of his property, unless, at all events, his conduct, in the circumstances, amounted to a representation to those dealing with the property that he would not assert his rights, and they have acted on that representation, or his subsequent assertion of his rights would constitute a fraud on his part. That such is the principle is, I think, clear from the authorities.

In 1723, in Savage v. Foster, 9 Mod. 35, the owner was held to be estopped from setting up his rights, "for it was apparent fraud in him not to give notice of his title to the intended purchaser."

Another illustration of the method in which the Court deals with such cases is afforded by the judgment of Fry, L.J., in Willmott v. Barber, 15 Ch. D. 96, at pp. 105 and 106. He says: "It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and

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in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place, the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but, in my judgment, nothing short of this will do."

Tried by these tests, the respondents' case on this branch utterly fails. Nobody suggests that the appellant knew or suspected that the taxes for the years mentioned had not been lawfully levied and were not exigible. Where, then, was the fraud? Emphasis is placed on the fact that the appellant appears to have known that the meeting of the Court of Revision was held in Vancouver in 1894. But it is obvious that the appellant never suspected that this circumstance vitiated the assessment of his property; and the municipal officers certainly knew, and, for all that appears in evidence, the purchaser (who seems in the purchase to have acted on behalf of the mortgagee) may have known, much more about the affairs of the municipality than the appellant. The contention really comes to this, that the owner of real estate, having failed to pay taxes demanded of him and having had his property sold to pay them, is acting fraudulently, if, after having discovered that no taxes were

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ever lawfully levied, he resists a claim of the purchaser o register his title. Does the failure to pay taxes alone disentitle an owner of land from insisting that he can only be deprived of his property according to law? That appears to me to be an extreme view and a novel view as well. The purchaser at a tax sale has the same opportunities of examining the validity of the proceedings prior to the sale as the owner of the property sold. Why should the owner suppose that the proposed purchaser, still less the municipality, is acting upon the assumption that he will not take advantage of his legal position, whatever it may be? If there is a fatal defect in the proceedings, of which both purchaser and owner are ignorant, how can the purchaser complain if the owner (who has been no party to the proceedings and has done nothing calculated to throw him off his guard), discovering the defect later, takes his stand on his strict legal rights? If the purchaser cannot complain, still less can the municipality.

I should make a reference to Jones v. North Vancouver Land and Improvement Co., 14 B. C. R. 285, [1910] A. C. 317, and Prendergast v. Turton, 13 L. J. Ch. 268, which appear to have influenced the opinion of the Court below. The principle of these decisions is thus stated in Clarke v. Hart, 6 H. L. C. 633, at p. 670, by Lord Wensleydale: "Now, it appears to me that the principle to be deduced from Prendergast v. Turton, 13 L. J. Ch. 268, and Norway v. Rowe, 19 Ves. 143, is, that if a party lies by, and by his conduct intimates to the other partners in the concern that he has abandoned his share, they may deal with it as they please; if his conduct amounts to a representation of that sort, he is estopped by it and cannot afterwards complain. Then the question is, whether upon the facts stated in this case the respondent is in that situation. . . . In that case the interpretation put upon the conduct of the parties, . . . was that they had laid by and pursued a course which was tantamount to saying, 'You may go on with the concern at your own risk and for your own benefit; I will have nothing more to do with it.' If the conduct of the party has amounted to that, it is, no doubt, a perfectly just principle that he shall be held estopped, and not afterwards be entitled to claim a share of the profit made by those persons to whom he has made that representation."

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In all these cases, it will be observed that the fact that the parties were co-adventurers had no small influence in determining the decision of the Court that the conduct of the plaintiff had had the effect thus described by Lord Wensleydale. Conduct which would be most unfair, and even dishonest, as between persons thus associated, may be unimpeached where the parties concerned stand in no business relation to one another and have always been at arms' length. I do not think any good purpose would be served by going minutely over the facts of those cases. The question is, whether the facts of this case bring it within the principle upon which those cases proceeded.

In Colls v. Home and Colonial Stores Limited, [1904] A. C. 179, at pp. 191, 192, Lord Macnaghten said: "Speaking for myself, I doubt very much whether it is a profitable task to re-try actions which depend simply on questions of fact, or to review an endeavour to reconcile or distinguish a number of cases that naturally enough contain some statements which, taken by themselves and apart from the context, may seem to be contradictory, but which must all proceed upon the same principle. It would only be another link in the embarrassing chain of authority, or, if I may venture to say so, only another handful of dust to be cast into one scale or the other when the claims of opposing litigants come to be weighed in the balance. I think there is much more sense in the observations of Brett, L.J., in Ecclesiastical Commissioners v. Kino, 14 Ch. D. 213. 'To my mind,' said his Lordship, 'the taking of some expression of a Judge used in deciding a question of fact as to his own view of some one fact being material on a particular occasion, as laying down a rule of conduct for other Judges in considering a similar state of facts in another case, is a false mode of treating authority. It appears to me that the view of a learned Judge in a particular case as to the value of a particular piece of evidence is of no use to other Judges who have to determine a similar question of fact in other cases, where there may be many different circumstances to be taken into consideration.'"

It is possible, no doubt, to present some aspects of this case in such a way as to cause them to assume a superficial resemblance to the most striking features in the cases referred to. But, examining it fairly as a question of fact, in light of the whole of the facts disclosed by the evidence,

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it seems to me to be a very extravagant view that there was anything fraudulent in the appellant's conduct, or that his silence or inaction was calculated to lead or did in fact lead anybody into shaping his course of action upon the belief that the appellant would refrain from asserting any right of which he had not been deprived by due process of law.

It was argued, also, that the action was too late. This defence is not pleaded and was not raised at the trial or in the Court of Appeal, and on that ground, I think, it ought not to be considered. Admittedly, a writ was issued within the time prescribed by the Act of 1901; and the action so commenced, for all that appears, was on foot at the time of the trial. The object of commencing the second action appears to have been to avoid the expense of amending the first writ by adding some necessary parties. If the defence now put forward had been raised in the statement of defence, the actions might have been consolidated or the second action discontinued and the first proceeded with; and, if the point had been taken at the trial, the learned trial Judge would probably, if he had thought it necessary, have made an order to consolidate the actions, or adjourned the trial to enable such an order to be made. In these circumstances, it is clearly too late now to give effect to the point.

ANGLIN, J.:—The plaintiff seeks a judgment declaratory of the nullity of proceedings taken by the defendant municipality for the sale for arrears of taxes of certain land, in which he had a half interest, and consequential relief, alleging that the taxes said to be in arrear had not been validly imposed, and also irregularities in the sale proceedings.

The learned trial Judge dismissed the action. He held that the taxes were valid, and that there had been no fatal irregularity in the sale proceedings. He was further of the opinion that, if there was irregularity in the imposition of the taxes, the plaintiff was debarred from relief because proceedings to quash the taxation by-laws had not been taken within one month after each of them was promulgated (Municipal Act, 1892, sec. 126.) Any irregularity in the sale proceedings, he thought, would be covered by certain curative provisions of the same statute. Moreover, in his opinion, the defendants had established laches and acquies-

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cence on the part of the plaintiff sufficient to defeat the action.

On appeal Macdonald, C.J.A., agreed with the trial Judge that no fatal irregularity in the sale proceedings had been shewn, and that the objections to the validity of the taxes themselves, based on the facts that the meetings of the municipal council at which the by-laws imposing the rates were adopted, and of the Court of Revision at which the assessment rolls were passed, had been held outside the territorial limits of the municipality, failed, because, in his opinion, "the so-called Court is merely a sitting of the council," and there was sufficient proof that the council had "unanimously resolved that it would be more convenient to hold (its) meetings . . . outside of the limits of the municipality," as it was authorised to do by 57 Vict. ch. 34, sec. 15. He also thought a case of laches and acquiescence had been made out. Galliher, J.A., concurred, but upon the last mentioned ground only. Irving, J.A., would have allowed the plaintiff's appeal, on the grounds that no resolution providing for the holding of council meetings outside the municipality had been proved; that no authority existed for holding meetings of the Court of Revision without the municipal limits; that notice of the sale to the plaintiff had not been established; and that the curative sections invoked were inapplicable. Acquiescence, in his opinion, was not established. Martin, J.A., found no evidence of any resolution authorising meetings of council outside the municipal limits, and no proof of acquiescence on the part of the plaintiff.

From this affirmance, by an equal division in the Court of Appeal, of the judgment dismissing his action, the plaintiff appeals to this Court.

For the meetings of council held outside the limits of the municipality prior to the amendment of 1894 (57 Vict. ch. 34, sec. 15) there was no statutory authority whatever. As to the meetings held after that amendment became law, I agree with Irving and Martin, JJ.A., that the evidence is insufficient to support a finding that the municipal council unanimously adopted a resolution, formal or informal, giving the authority requisite under 57 Vict. ch. 34, sec. 15, for the holding of its meetings outside the municipality. I think the onus was on the defendants to prove such a resolution or to establish facts from which it might be fairly in-

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ferred. But, if the burden was upon the plaintiff to shew that such a resolution had not in fact been passed, the evidence, in my opinion, warrants that conclusion.

The Municipal Act, sec. 97, requires that "the minutes of the proceedings of all meetings of the council shall be drawn up and fairly entered into a book to be kept for that purpose and shall be signed by the mayor," etc.

The minute-book was duly produced. It contains no entry of any such resolution. This would probably suffice to establish its non-existence: Taylor on Evidence, 10th ed., sec. 1781. But, if not, the evidence of the municipal clerk, Martin, to the effect that all resolutions of the council passed during his term of office appear in the minute-book, and that a resolution fixing Vancouver as the place of meeting would, if passed, appear in the minutes, makes complete the proof that there was no such resolution. In the face of this evidence, it seems to me impossible to infer, merely from the fact that the council held practically all its meetings outside the municipality, that the requisite resolution had been passed. It would be still more difficult to infer that it had been passed unanimously.

Notwithstanding the dearth of authority on the point, due probably to the rarity of such a departure from normal and eminently reasonable practice as would be the holding of meetings of municipal councils outside the limits of the municipality without special statutory authority, I entertain no doubt that the meetings held in the city of Vancouver, because not specially authorised by statute (e.g., the Ontario Municipal Act, 1903, sec. 265), were illegal, and that the taxation by-laws enacted at them were not merely irregular, but were null and void. There appears to be no English or Canadian authority. Paffard v. County of Lincoln, 24 U. C. R. 16, may be referred to. But Board of Commissioners of Marion County v. Barker, 25 Kans. 258, appears to be the only case directly in point. See, too, Harris v. State, 72 Miss. 960; Re Hill and Township of Walsingham, 9 U. C. R. 310, at p. 312.

But, if an inference that such a resolution had been passed might be drawn from the course pursued by the council subsequently to the Act of 1894, that would not, in my opinion, authorise the holding of sessions of the Court of Revision outside the limits of the municipality. I am, with respect, unable to accept the view that "this so-called

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Court is merely a sitting of the council." In many, perhaps in most cases, the personnel of the municipal council and that of the Court of Revision may be the same (Municipal Act, 1892, sec. 160.) But, notwithstanding the form of the opening paragraph of sec. 157 of the statute, they must be deemed distinct entities, at least to this extent—that the statutory provision authorising the holding, in certain circumstances, of meetings of the council outside the limits of the municipality is inapplicable to the sessions of the Court of Revision. The complainants against the work of the assessor are obliged to attend these sessions, either in person or by agent, and nothing short of a direct and explicit statutory enactment would suffice to take away their right to have them held within the limits of the municipality. That the Court of Revision and the municipal council are not the same body is, I think, made abundantly clear by sec. 161 of the Municipal Act: "161. If the council consists of more than five members, such council shall by resolution appoint five of its members to be the Court of Revision."

The body discharging the functions of the Court of Revision might have a personnel entirely different from the council. Of this the cities of Ontario afford examples (Ontario Assessment Act, 4 Edw. VII. ch. 23, sec. 57.) That councillors act as members of the Court is due mainly to considerations of convenience, or it may be of economy. When sitting qua Court of Revision, the members of it, although it should have the same personnel as the council, can exercise none of the legislative or administrative powers of the latter body; neither can the council, when sitting as such, discharge any of the judicial functions of the Court of Revision. The notice prescribed by sec. 157 of the Act leads to this conclusion. The procedure provided by sec. 158 is consistent with it.

That the Court of Revision is a Court of limited jurisdiction, constituted to discharge judicial functions, is, I think, the proper conclusion from the provisions of sec. 162, 164, 165, and 166 of the Municipal Act, and from such authorities as Toronto R. W. Co. v. City of Toronto, [1904] A. C. 809; Re Crow's Nest Pass Coal Co.'s Assessment, 13 B. C. R. 55; Sisters of Charity of Providence v. City of Vancouver, 44 S. C. R. 29, at p. 37; and Re Rosbach and Carlyle, 23 O. R. 37; that its jurisdiction is territorially restricted by the limits of the municipality, is undoubted. In the absence of

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express statutory authority permitting it to hold its sessions beyond the territorial limits over which it holds jurisdiction, such a Court can validly exercise its powers only when sitting within that territory: The Queen v. Inhabitants of Totness, 11 Q. B. 80; Ex p. Graves, 35 N. B. R. 587, 593; Phillips v. Thralls, 26 Kans. 780. But, if the sittings of the Court of Revision should be deemed meetings of the council, for reasons already given, they could not lawfully be held outside the municipality.

The "passing" of the assessment rolls at legal sessions of a duly constituted Court of Revision was, I think, essential to their validity. In the absence of rolls so "passed," there was no power in the municipal council to enact the by-laws imposing the rates complained of. It follows that the taxes in question were not legally or validly imposed or levied.

There is no curative provision in the statute which overcomes such an objection. The section invoked by the learned trial Judge, which declares the validity of every by-law not moved against within one month after its publication, is restricted in its application to by-laws "within the competence of the council." The taxation by-laws impugned in this action were not within the competence of the council. Without valid assessment rolls duly "passed" by the Court of Revision, it was not competent for the council to enact them. They were nullities. Proceedings to quash them were unnecessary.

Unless debarred by estoppel, acquiescence, or laches, the plaintiff is, in my opinion, entitled to the relief he seeks.

The plaintiff is asserting a legal, not an equitable right. Mere laches, as distinguished from acquiescence or estoppel, will not preclude his recovery: De Busche v. Alt, 8 Ch. D. 286, at p. 314; In re Madevver, 27 Ch. D. 523.

There is no evidence of any actual representation or of any voluntary act on his part calculated to induce a belief that the defendant municipality was in a position to make a valid sale of the property in question for arrears of taxes, or that the plaintiff assented to or acquiesced in the sale. This case is, therefore, clearly distinguishable from Toronto Corporation v. Russell, [1908] A. C. 493, much relied upon at bar. Neither was there any conduct of the plaintiff from which a purchaser could reasonably infer an intention on his part not to enforce his rights—if, indeed, that would

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suffice: Chadwick v. Manning, [1896] A. C. 231—or that he had no rights. The defendant municipality, certainly, had all the knowledge which the plaintiff could have had of the facts now relied upon to render the assessment invalid; its co-defendants, the purchasers, for aught that appears, had the same means of knowledge; and there is nothing to shew that they had not quite as much actual knowledge of these facts as the plaintiff had. The plaintiff's own knowledge of them is very doubtful; and that he was aware of their effect on the validity of the taxes there is not a tittle of evidence. Although misleading action, in ignorance of rights, may, in some circumstances, give rise to an estoppel. Sarat Chunder Dey v. Gogal Chunder Laha, L. R. 19 Ind. App. 203, at pp. 214, 215: a party cannot, because of mere silence or inaction, be held to have acquiesced unless he was fully cognizant of his adverse right: Earl Beauchamp v. Winn, L. R. 6 H. L. 223, at p. 225; Willmott v. Barber, 15 Ch. D. 96, at p. 105. If he be ignorant of his right, the duty to speak, upon the failure to discharge which the equitable estoppel is based, does not arise. "Silence is innocent and safe where there is no duty to speak:" Chadwick v. Manning, supra. The evidence that the plaintiff knew of the intended sale is somewhat dubious. But, if he did, and if he was fully cognizant of his own rights, his duty to intervene is by no means clear, having regard to the vendor-corporation's actual knowledge of the facts on which objection to the validity of the taxes for which the lands were to be sold is based, and its public character—and to the means of knowledge available to the defendant purchasers, and the absence of any evidence that they were, or that the plaintiff had reason to believe they were, ignorant of such facts, or that he knew that his land would be purchased under a mistaken belief as to his right: Willmott v. Barber, 15 Ch. D. 96, at p. 165; Proctor v. Bennis, 36 Ch. D. 740, at p. 760. I am unable to see how the plaintiff's inaction can be said to have been culpable, or to have induced the defendant municipality to sell or its co-defendant to purchase. That was the case which the defendants undertook to make out under their defence of acquiescence or estoppel. They have, in my opinion, failed to establish it.

It follows that this appeal should be allowed, and that judgment should be entered for the plaintiff with costs throughout.

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BRODEUR, J. (dissenting):—By his action the appellant wants to set aside a tax sale that had taken place more than ten years before.

It was dismissed by the Supreme Court of British Columbia, and, the Court of Appeal of that province being equally divided, the judgment of the Supreme Court was not disturbed.

Several questions have been raised before this Court, but they can be reduced to the two following:—

1st. Did the municipal council of South Vancouver, by sitting outside of the municipality, impose a valid taxation, and could a property be validly sold for taxes?

2nd. Did the appellant acquiesce in the validity of the proceedings of the council and of the tax sale?

I will state the facts as briefly as possible.

In 1892, the Municipality of South Vancouver was created by proclamation of the Lieutenant-Governor in Council, under the provisions of the general Municipal Act, 55 Vict. ch. 33.

It was a rural municipality, covering a large territory around the city of Vancouver.

It was sparsely settled, just a few houses here and there. Most of the residents had their business in the adjoining city, and a large number of property-owners were living and residing also in that city.

The communications between those different settlements were rather difficult, though all of them had an easy access to Vancouver.

One of the first questions that the municipal council had to decide was the selection of the locality where they would hold their meetings.

They had met for the purpose of organisation on the 7th May, 1892, at a school-house in the municipality. That school-house was not, however, their property or under their control.

They unanimously decided "that the next meeting be held" at 623 Hastings street, in the adjoining city of Vancouver.

From that date, the clerk of the municipality had his office at that place, the council sat there for their ordinary meetings and for their meetings as a Court of Revision. All the by-laws, including assessment, rate, or tax sale by-laws, were passed there and published in newspapers in Vancouver

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(since none were published in the municipality itself) and in the official Gazette; and those advertisements generally contained the above address, 623 Hastings street, as being the place of business of the municipality.

If notices had to be given to individuals, they contained the same information.

It was then, notoriously, known that the council was sitting in the city.

The appellant himself, one day in 1894, appeared before the council sitting there as the Court of Revision, at that place, to appeal against an assessment put on his property, which is the one in dispute in this case.

He never raised the objection that the council, or the Court of Revision, was not holding its meetings at a proper place, though a decision adverse to his request was then rendered.

Neither the Attorney-General nor the provincial authorities ever objected to the council holding its meetings outside of the municipality. Until 1894, no provision was inserted in the Municipal Act as to the places where the councils should sit. In that year, an amendment was made, which should be interpreted in favour of the validity of the council's action. It declared that the meetings of the council should be held in the municipality, unless the councillors unanimously resolved to hold them outside. We have in the Municipal Code in Quebec a similar provision (art. 106).

That amendment was interpreted by the clerk as meaning that the council of South Vancouver should hold its first meeting in January each year in the municipality; and we see that in the next years they used to meet at a railway station in the municipality, and pass a resolution to hold their meetings in Vancouver, always at the same place, 623 Hastings street.

It is true that the resolutions are not as formal as should be desired, but we must not expect that the minutes of proceedings of those rural municipalities should be obsolutely regular and formal.

Those proceedings were carried on in good faith. They were notorious, and were known by the appellant.

It would be contrary to the welfare of our municipal institutions to allow a person to come after sixteen years and say that those proceedings were null and void.

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The appellant knew that his property was assessed for the payment of the municipal taxes. He was supposed to see in the official Gazette and in the local newspapers that the meetings of the council were held in Vancouver.

He never paid his taxes; and, even after the property was sold, he never inquired for the payment of the taxes. He received, until the property was sold for taxes, from the assessor and from the collector, notices shewing the assessment and the amount due for taxes. He asserts that when the tax sale was made he did not receive the notice that the law provided. It is one of the disputed facts of this case. The appellant relies a great deal upon the absence of such notice to maintain his appeal.

The evidence may be conflicting; but it is one of those cases where the trial Judge, who has the opportunity of seeing and hearing the witnesses, is in a better position to express his opinion than by the mere reading of the evidence. I may add, however, that the hesitations of the appellant, when he was in the witness-box, convinced me that he received in due time that notice; and I concur heartily in the finding of the trial Judge that the appellant knew that the lot in which he was interested was advertised for sale to satisfy the taxes against it, and that he duly received a notice to that effect. In spite of his denial of the knowledge of an actual sale, he must be taken to have known that the advertised sale was duly carried out and that his land was sold.

Why then did he not move? The explanation of his silence is given to us by the clerk of the municipality, who happened to meet him at the time, and the appellant told him "that he did not think the property was worth very much at the time. He did not know whether it was worth the taxes or not."

It may be added that the lot was then in the bush, and that there was no access to it whatever. The appellant admits that he visited that lot only once. The property was sold for the amount of the taxes, and purchased practically by the mortgagee of the property, who, I suppose, wanted to protect his interests.

The appellant, who knew of the existence of that mortgage and the depression of the land market in the locality, was satisfied to let the lot be sold.



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Ten years later, when the property has largely increased in value, and is worth perhaps $20,000, he comes and asks the Courts to declare the tax sale null and void because the council sat in the city of Vancouver, in the city where he was himself living. I find that the proceedings of the council should be held valid, and that the appellant, by his actions, his declarations, and his conduct generally, in what has been done, is estopped by such acquiescence from setting up any title to the said property.

I would not feel disposed to maintain his action.

In declaring all the proceedings of the council null and void, we would simply create a state of chaos and confusion and cause the ruin of many innocent persons.

The appeal should be dismissed.

Appeal allowed with costs; BRODEUR, J., dissenting.

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## SASKATCHEWAN.

BROWN, J. MARCH 5TH, 1912.

CHAMBERS.

## LOCK v. SNYDER.

*Costs—Order of Local Master—Appeal—Leave—Discretion—Plaintiff Required to Pay Costs of Unsuccessful Application by Defendants—Defendants Misled by Mistake of Plaintiff's Solicitors—Security for Costs—Practice.*

A Local Master dismissed the defendants' application for an order requiring the plaintiff to furnish security for the defendants' costs, but ordered the plaintiff to pay the costs of the application, because the plaintiff's solicitor, not knowing that the plaintiff had come to reside in Saskatchewan nine months before the commencement of the action, had, in the statement of claim, stated his place of residence to be at a city in Alberta, whence he had come to Saskatchewan:—

*Held*, that, under Rule 622, an appeal by the plaintiff from the order as to costs lay, without leave.

*Foster* v. *Edwards*, 48 L. J. Q. B. 767, followed.

*Held*, also, that the order as to costs was within the power of the Local Master (Rule (620), and was a discretionary order such as should not be interfered with on appeal unless there was a violation of principle or misapprehension of facts.

*In re Gilbert*, 28 Ch. D. 549, and *Young* v. *Thomas*, [1892] 2 Ch. 134, followed.

*Held*, also, that the order was a reasonable and proper one, and should not be interfered with.

*Held*, also, upon the evidence, that the plaintiff had not shewn that the defendants or their solicitors knew or ought to have known of the plaintiff's change of address.

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Appeal by the plaintiff from an order made by the Local Master at Moose Jaw on an application by the defendants for security for costs. The Local Master dismissed the application of the defendants, and ordered the plaintiff to pay the costs; and the plaintiff appealed, contending that the Local Master was wrong in ordering him (the plaintiff) to pay the costs.

Allan, for the plaintiff.

Mackenzie, for the defendants.

BROWN, J.:—It is objected on behalf of the defendants that the question of costs is in the discretion of the Local Master, and that, by virtue of Rule 646, there is no appeal except by leave. No leave was obtained in this case.

The appeal is taken under Rule 622; and it has been held, under a similar English Rule, with which holding I agree, that no leave is required: Foster v. Edwards, 48 L. J. Q. B. 767. The order as to costs is within the power of the Local Master (Rule 620), and it is discretionary with him (Rule 709). I am, therefore, of the opinion that, although no leave is necessary, yet the order should, on appeal, be dealt with on the same principle as a discretionary order where leave is necessary and has been obtained under Rule 646. In such a case the appeal Court will not interfere unless there has been a violation of principle or misapprehension of facts: In re Gilbert, 28 Ch. D. 459; Young v. Thomas, [1892] 2 Ch. 134.

In this case, I fail to find any such ground for interference. The writ was issued on the 13th January, 1912, and the plaintiff's address and occupation is given, in the statement of claim and other proceedings in the action, as of Calgary, Alberta, rancher. The plaintiff's solicitors at Moose Jaw issued the writ, under instructions from his solicitors at Calgary. In the instructions the Calgary solicitors described the plaintiff as of Calgary, rancher. The Moose Jaw solicitors issued the writ believing that the plaintiff's place of abode was Calgary; and they were not aware of any change in the plaintiff's address until the 29th January, 1912. As a matter of fact, the plaintiff was not at the time of the issue of the writ resident at Calgary: he had changed his residence from Calgary to Moose Jaw as far back as the 6th April, 1911, nine months before the issue of the writ. The defendants' application was dismissed, owing to the fact that,

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at the time of the application, the plaintiff was resident within the jurisdiction. But the application proved abortive, and the costs in connection with the same were incurred, because of the wrong address given in the plaintiff's proceedings. This, it is true, was done in mistake, but it was a mistake which should not, in any degree, be saddled upon the defendants. If the change in address had been made after the issue of the writ and before the application for security, there would be force in the argument that the costs of both parties should be costs in the cause; but the case here is entirely different.

It is contended on behalf of the appellant that the defendants' solicitors knew that the plaintiff was resident in Moose Jaw before they made the application for security for costs, and the affidavit of the plaintiff is relied upon to support that contention. That affidavit does not go so far as contended for. It simply shews that the defendants' solitors acted for the Candian City and Towns Properties Limited, a company doing business at Moose Jaw, and of which the plaintiff was the manager at Moose Jaw; and that, by virtue of the business done for that company in their office, they (the defendants' solicitors) should have known that the plaintiff was the same person as the manager of the said company. It also sets out that the plaintiff, before application was made for security, telephoned to the defendants' solicitors informing them that he and the manager of the company were one and the same person. There is, however, nothing in this affidavit which shews that the defendants' solicitors knew or ought to have known that the plaintiff had changed his place of abode from Calgary to Moose Jaw. He may have been doing business in Moose Jaw as manager of that company, without that place necessarily being his place of abode. And, in view of the address given by the plaintiff in his proceedings, the defendants' solicitors would quite naturally assume that Calgary was still his proper place of abode. The plaintiff has not shewn that the defendants or their solicitors knew or ought to have known of the change. I am, therefore, of opinion that the order of the Local Master is right, and have no hesitation in saying that it is one that I should not interfere with.

The appeal will be dismissed with costs.

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## SASKATCHEWAN.

BROWN, J. MARCH 5TH, 1912.

CHAMBERS.

### RE CASWELL.

*Will—Construction—Gifts to Wife—Cesser of Interest on Remarriage—Effect on Absolute Gift—Gift of Income—Disposition of Estate on Remarriage of Widow—Uncertainty or Ambiguity—Sale of Estate — Distribution of Proceeds—Approval of Offer to Purchase Business of Testator.*

The testator by his will gave certain property absolutely to his wife and also directed his executors and trustees to pay her a share of the income of his estate—"provided that if my said wife should in the meantime marry again she shall thereupon cease to have any right or interest whatsoever under this my will or in my said residuary estate:"—

*Held*, that the proviso quoted and another similar one in the will did not affect the absolute gift; but should be given full effect (the widow having remarried) as to the other provision made for her in the will.

*Held*, also, that the will (as set out below) was not vague or uncertain or ambiguous in its terms; and, upon the remarriage of the widow, the testator's estate should be divided among his children share and share alike—although this had the effect of depriving the testator's father of a share of the income given to him in the early part of the will.

*Held*, also, that it was the duty of the trustees to sell and convert the estate into money as soon as they could reasonably do so, having in view the necessity of realising the best possible returns therefor; and distrbiution should take place when and as often as any portion was converted into money.

*Held*, also, that an offer to purchase the testator's business at seventy-five cents on the dollar should be accepted by the trustees.

Application by the trustees of the will of the late Stephen Howard Caswell for an order determining the construction to be placed upon the will, which was as follows:—

1. I hereby revoke all former or other wills codicils or testamentary dispositions by me at any time heretofore made.

2. I direct that all my just debts funeral and testamentary expenses be paid by my executors hereinafter named so soon as may be after my decease.

3. I give devise and bequeath unto my wife Emma Elizabeth Caswell all my horses carriages jewelry personal ornaments wearing apparel plate linen china books furniture and other household effects whatsoever for her own use absolutely.

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4. All the rest and residue of my estate and effects both real and personal and wheresoever situate I give devise and bequeath unto my said wife Emma Elizabeth Caswell my father James Caswell Albert Alfred Mitchell Dale farmer Thomas A. Grigg farmer all of the town of Qu'Appelle in the District of Assiniboia and Douglas Alexander Clark of the City of Winnipeg in the Province of Manitoba wholesale stationer their heirs executors and administrators upon trust that they or the survivor of them or the executors and administrators of such survivor shall do and execute the trusts hereinafter set forth.

5. I desire that the business in which I am engaged shall be continued and carried on after my decease as nearly as may be in accordance with the provisions of the partnership agreement made between myself and William Atkinson Caswell dated the 25th day of June 1895 until my son Stephen Howard Caswell shall have attained the full age of twenty-one years and for such purpose my said trustees may do all that may be requisite and necessary in the usual course of business.

6. The income and proceeds arising from such business during the period hereinbefore mentioned shall be applied by my said trustees as far as may be necessary in or towards the maintenance and support of my said wife Emma Elizabeth Cashwell my father James Caswell and my children and any surplus of such income remaining after supplying such maintenance and support shall be invested from time to time by my said trustees according to the terms of the partnership agreement hereinbefore mentioned provided that if my said wife should in the meantime marry again she shall thereupon cease to have any right or interest whatsoever under this my will or in my said residuary estate.

7. It is my wish and desire that my said son Stephen Howard Caswell should after my decease take and supply my place as nearly as may be towards my said father wife and my children after he shall have attained the full age of twenty-one years provided that he shall have proved himself to the satisfaction of my said trustees to be capable and worthy of such a trust and as to this my said trustees or a majority of them shall have full and absolute power and authority to determine and decide.

8. Upon my said son Stephen Howard Caswell attaining the said age of twenty-one years if in their discretion as afore-

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said they shall consider that he is to be trusted to continue my business in the manner I desire and to carry out my wishes as I have herein indicated my said trustees shall transfer and assure to my said son Stephen Howard Caswell by whatever conveyance or conveyances may be necessary and with all proper provisions therein for preserving the trust hereinafter mentioned the whole of my said residuary estate subject to and charged with the following trusts and conditions namely.

9. That my said son shall well and sufficiently maintain and support my said wife Emma Elizabeth Caswell during her natural life or until she shall marry again and shall also maintain and support my said father James Caswell during his natural life and shall also pay annually to my two daughters Anna Sarah Caswell and Kathleen Lyn Caswell the sum of six hundred dollars each until they shall respectively marry. And upon the performance of the said trusts my said son Stephen Howard Caswell shall take the whole of my residuary estate for his own sole use absolutely.

10. And if upon my said son Stephen Howard Caswell attaining the said age of twenty-one years my said trustees shall in their discretion conclude that my said son will not in all probability carry out my desire and fulfil my wishes as hereinbefore expressed or in case my said son should die before attaining said age or if it should during his minority become impossible for any reason which my said trustees shall in their discretion consider good and sufficient to carry on the said business then my said trustees shall sell and convert into money such parts of the said trust estate as shall not consist of money (but they may in their discretion leave unconverted any real estate) and invest the same in the names of my said trustees for the time being in such manner as my said trustees shall deem advisable and from and out of the income arising from such investment or investments and from the unconverted real estate pay or apply yearly the sum of six hundred dollars in or towards the maintenance and support of each of my children and that of my said father James Caswell (that is to say $600 for each) and the balance of such income shall be paid to my said wife Emma Elizabeth Caswell during her life or until her marriage.

11. And upon the death or second marriage of my said wife my said trustees shall stand possessed of my said residuary estate in trust for all my children equally share a

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share alike provided always and I hereby declare that no son or sons of mine who shall previously to his or their majority have settled in the United States of America shall be or become entitled to any share or interest whatsoever under this my will or in my estate.

12. And I further declare that my said trustees may postpone the sale and conversion of any part or parts of my real or personal estate so long as they deem proper with power to manage let or lease or otherwise or cultivate my real or leasehold estate and expend such money as they think proper for improvements repairs insurance or otherwise.

13. And I declare that in the event of my said trustees or any of them dying or desiring to be discharged or becoming incapable to act the surviving or continuing trustees may appoint a new trustee or trustees provided that at no time if possible shall there be less than three trustees of this my will irrespective of my said wife and my said father.

14. And I appoint my said wife during her life and after her death my said trustees guardian and guardians of my infant children.

15. And I appoint the said Emma Elizabeth Caswell James Caswell Albert Alfred Michell Dale Thomas A. Grigg and Douglas Alexander Clark to be the executors of this my will.

16. And I give devise and bequeath to each of them the said Emma Elizabeth Caswell James Caswell Albert Alfred Michell Dale Thomas A. Grigg and Douglas Alexander Clark in the event of their severally proving this my will the sum of one hundred dollars.

The material filed shews that the widow of the deceased has re-married; that the son Stephen Howard Caswell has attained the age of twenty-one years: and that the trustees have decided that he is not, by reason of inexperience, capable of taking over the management of the business of the deceased.

P. H. Gordon, for the trustees.

A. L. Gordon, for the widow.

J. F. Frame, for Stephen Howard Caswell the younger.

T. S. McMorran, for Kathleen L. Caswell and Anna S. Caswell, and for the Official Guardian.

BROWN, J.:—It is contended on behalf of the widow that the provisoes with reference to her re-marriage should be

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treated as void as being in general restraint of marriage; and that, in any event, the will is so uncertain as to the method of distribution contemplated that it should be treated as a nullity and the widow given one-third of the estate as if no will had been executed at all.

I cannot accede to either of these contentions. By paragraph (3) the widow is given certain property absolutely; and the subsequent provisions as to re-marriage cannot, under the authorities, be held to affect that gift. Notwithstanding her re-marriage, she is entitled to the goods referred to in that paragraph; but, so far as the remaining provisions are concerned, the property given is limited to the period while she remains unmarried, and they must be given their full effect: Morley v. Rennoldson, 2 Hare 571; Heath v. Lewis, 22 L. J. Ch. 721.

Nor can the will be said to be uncertain in its terms. It is clear that the testator looked forward to the time when his son Stephen Howard Caswell would become twenty-one years of age, and in making the will he definitely provides for the conditions arising before and after that time. By paragraphs (5) and (6) he requires the business continued until the son becomes twenty-one years of age, and stipulates how the proceeds shall during that time be applied. The provisions contained in paragraphs 7, 8, and 9 become applicable immediately the son attains the age of twenty-one years, if at that time the trustees regard him as capable and worthy. But the trustees have decided that he is not capable; and it is not contended that they have reached that conclusion on any wrong principle.

Consequently, under the existing state of facts, we are brought to a consideration of paragraphs 10, 11, and 12. Paragraph 10 stipulates what shall be done in the event of the trustees reaching the conclusion which they have reached, and until the re-marriage or death of the widow. It, therefore, does not apply to the existing state of facts, because the widow has married again. The provisions contained in paragraph 11 are, therefore, in my opinion, the ones that are applicable to the existing state of facts, and which should govern the trustees in the distribution of the estate. By that paragraph, the residuary estate goes to all the children share and share alike. Neither the widow nor the father is entitled to any share thereof. It is contended that the testator could never have meant to disinherit the father; but I can only

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look to the will in gathering the intention, and I fail to see wherein the will is at all ambiguous. It was stated by counsel, and generally assented to, that the father, in any event, would be amply protected, and it is pleasing to know that such will be the case.

I am further of opinion that it is the duty of the trustees to sell and convert the estate into money as soon as they can reasonably do so, having in view the necessity of realising the best possible returns therefor. That, it seems to me, is the reasonable interpretation to be put upon paragraphs 10, 11, and 12, when read together.

I am also of opinion that distribution should take place when and so often as the estate or any portion thereof is so converted into money.

The trustees have an offer from William A. Caswell to purchase the business at seventy-five cents on the dollar, and ask to have such sale approved. This offer appears, from the material filed, to be a good one from the point of view of the estate; and, as all parties consent, I have no hesitation in approving of the same.

The costs of this application to all parties will be paid out of the estate.

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## SASKATCHEWAN.

MACLEAN, DIST. CT. J. MARCH 5TH, 1912.

DISTRICT COURT OF BATTLEFORD.

### THISTLETHWAITE v. SHARP.

*Landlord and Tenant—Sale of Demised Premises—Notice to Purchaser of Tenancy — Condition as to Removal of Building Erected by Tenant—Possession — Detention — Trover — Damages — Counterclaim — Detachment of Building — Damage to Freehold—Costs—Set-off—Chattel or Fixture.*

Possession of land by the vendor's tenant is constructive notice to the purchaser of the terms and conditions of the lease. The purchaser, knowing of the tenancy, is bound by all the conditions agreed to between the vendor and the tenant.

*Hunt* v. *Luck*. [1902] 1 Ch. 428, and *Hobson* v. *Gorringe*. [1897] 1 Ch. 182, specially referred to.

The plaintiff, being tenant of a lot with a house on it, put up a "lean-to," with the landlady's permission. The latter sold the house

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**and lot to the defendant, who had notice of the tenancy and of an agreement between the plaintiff and the vendor that the plaintiff was to be at liberty to remove the "lean-to" when he vacated the premises. The plaintiff, leaving the premises, detached the "lean-to," but left it on the lot, and the defendant refused to allow it to be removed:—**

***Held*, that the plaintiff was entitled to possession of the "lean-to" or to recover the value of it, and also damages for detention and illegal possession; and the defendant was entitled, upon his counterclaim, to recover damages for injury done to the main building in detaching the "lean-to"; and a set-off of damages and costs was directed.**

***Semble*, that the "lean-to" was not a fixture.**

Action for possession of a wooden building or for damages for illegal retention of possession by the defendants. Counterclaim for damages for injury to the defendant's house by the removal of the building claimed by the plaintiff.

A. M. Panton, for the plaintiff.

F. R. Conroy, for the defendant.

MACLEAN, DIST. CT. J.:—The plaintiff, in the month of October, 1911, rented (for two months) from one Mrs. George H. Stephenson lot 11 in block 12, plan B-3419, in the town of North Battleford, with the residence thereon, and occupied the same for a time. During the tenancy, on the 8th November, Mrs. Stephenson conveyed the lot and residence to William M. Sharp, the defendant. When the lot and premises were rented as aforesaid by the plaintiff, permission was given to him to construct a small building which was to form a lean-to connected with the house already erected thereon; and the plaintiff was, at the time, given permission to remove the same when he vacated the place on giving up the tenancy. The building so erected by the plaintiff was, on the 15th November, while he was in occupation of the premises, disconnected and removed a short distance from the other building, preparatory to moving it. The plaintiff moved out on the 18th November; and, although his tenancy had not expired, he allowed the purchaser to take possession.

In this action, the plaintiff claims possession of the said building from the defendant, or, in the alternative, damages for the illegal possession of the same.

The question whether the building formed part of the realty or was a chattel was argued at length by counsel for the plaintiff and defendant; but I do not require to decide that point, in view of my present finding.

The purchaser, the defendant, knew that the plaintiff was tenant at the time he bought. There is evidence that the de

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fendant was also told that the shack did not belong to the house; and George H. Stephenson, the husband of Mrs. Stephenson, who sold the property, and her agent, notified the defendant on the 5th December as follows: "This is to certify that Mr. Thistlethwaite erected the shed to the kitchen at his own expense and which belongs to him. Please allow him to remove same."

The legal authorities that I have examined all decide that possession by the tenant is constructive notice to the purchaser of the terms and conditions of lease. The purchaser, knowing that the plaintiff was a tenant, is bound by all the conditions and stipulations agreed to as between Mrs. Stephenson and Mr. Thistlethwaite.

In Preston on Abstracts, 2nd ed., vol. 5, p. 400, it is said that "possession by a tenant is constructive notice of his lease, and of all the stipulations in his lease and renders it incumbent on a purchaser to take notice of the nature and extent of the interest of a tenant."

In Hunt v. Luck, [1902] 1 Ch. 428, Vaughan Williams, L. J., says: "Speaking for myself . . . I think that the conclusion of Farwell, J., was right. In his judgment he, after quoting the older authorities, said (1): 'The rule established by these two cases may be stated thus: (1) A tenant's occupation is notice of all that tenant's rights, but not of his lessor's title or rights.' . . . We have therefore to apply the first of the rules stated by the learned Judge. Now, what does that mean? It means that, if a purchaser or a mortgagee has notice that the vendor or mortgagor is not in possession of the property, he must make inquiries of the person in possession—of the tenant who is in possession—and find out from him what his rights are, and, if he does not choose to do that, then whatever title he acquires as purchaser or mortgagee will be subject to the title or right of the tenant in possession. That, I believe, is a true statement of the law . . ."

See also Bell on Landlord and Tenant, 1904 ed., pp. 505-6.

Even if the building in question form part of the realty, the plaintiff can remove it under his contract with the lessor, of which contract the purchaser had legal notice.

In Hobson v. Gorringe, [1897] 1 Ch. 182, Smith, L.J., says: "It seems to us that the true view of the hiring and purchase agreement, coupled with the annexation of the engine to the soil which took place in this case, is that the engine became a fixture—i.e., part of the soil—when it was

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annexed to the soil by screws and bolts, subject as between Hobson and King to this, that Hobson had the right by contract to unfix it and take possession of it if King failed to pay him the monthly instalments. In our opinion, the engine became a fixture—i.e., part of the soil—subject to this right of Hobson which was given by contract. But this right was not an easement created by deed, nor was it conveyed by a covenant running with the land. Neither could the right be enforced in equity against any purchaser of the land without notice of the right; and the defendant Gorringe is such a purchaser. . . . That a person can agree to fix a chattel to the soil of another so that it becomes part of that other's freehold, upon the terms that the one shall be at liberty in certain events to retake possession, we do not doubt. . . ."

Were I required in this case to decide whether or not this building or lean-to was a fixture, I should be inclined to the view that the intention of the parties should be considered, and that it remained a chattel; but I am not called upon in this case to give a finding on that point. The plaintiff has the right to move the building in question, and I so find; and an order may go accordingly.

If, however, he prefer to allow it to remain on the property—the defendant having refused to give him the right to remove the same and thereby being liable for a wrongful act—he, the plaintiff, can have judgment for the value of the building, if he so desire, which value I fix at $100, the amount the plaintiff testified to in his evidence as being the cost of the building to him. The plaintiff stated that he could have rented the building had he been allowed to remove it; and I allow him two months' rent at $8 per month. I also allow him $15 damages for the illegal possession by the defendant. The plaintiff hired a man to remove the building, and incurred expense owing to the refusal of the defendant to allow its removal.

The defendant counterclaims for damages for injury caused to his residence through moving the plaintiff's building or lean-to. The plaintiff, in his pleading, denies all damage. There was conflicting evidence of the amount of damage done; the defendant asserts that the main building was injured, the plaster broken, and the kitchen parted from the stone building. The evidence does not satisfy me on this point. Mr. Streeter, a witness, is positive that the only damage was the splitting of the base board, the corner boards, two or three pieces of the siding, two drops broken, a piece of the cap

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ripped, and the steps removed. I am prepared to believe that the plaster may have also been injured, as the main building may have been shaken somewhat. Mr. Streeter says that he removed the top rails fastening the lean-to to the main building before he removed the 2 by 4 blocks, the underpinning; but I find from his evidence, on cross-examination, that he says: "The shack was nailed far enough to hold. I released all nails first before we moved it; didn't remove all; the rest came loose when we knocked two by fours from underneath." From this statement I can understand that the main building was somewhat shaken, and that the plaster would be broken in consequence of the disconnecting of the building. The plaintiff and Streeter both swore that $5 would repair all the damage. They do not take into consideration any injury except what was caused to the outside of the buildings; in view, however, of all the evidence, I fix the damage at $25, being the amount which the plaintiff testified the defendant asked from him when the matter of the damage was first spoken of. I allow nothing for the crevice between the buildings, as Streeter has testified that there was a crevice between the kitchen and the stone building before he removed the lean-to; and that he used a gauge or piece of wood to make sure whether or not the opening would be enlarged by the disconnecting of the said lean-to. Streeter was the only witness who gave positive evidence on this point; the other witnesses gave opinions only as to the crevice and what caused it.

Counsel for the plaintiff hinted, at the trial, that the defendant should not recover on his counterclaim, because the plaintiff was willing to repair any damage; but he could and should have made good the loss, even although possession of the building was refused him. This was a duty to be done, even if he had or had not a legal right to remove the building, and he should not have delayed repairing any damage caused by him. In the plaintiff's reply to the defence he denies all damage, and the defendant was entitled to prove his counterclaim, and is now entitled to recover.

I allow plaintiff the possession of the said building or, in the alternative, its value, which I fix at $100; also $16 for rent and $15 for damages for illegal possession, with costs; the plaintiff must make his choice within 15 days from the date of this judgment. I allow the defendant on his counterclaim the sum of $25, with costs in so far as he succeeds; and the same shall, on taxation, be set off against the plaintiff's claim and costs, and judgment be entered for plaintiff for the balance.

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## MANITOBA.

MARCH 4TH, 1912.

### COURT OF APPEAL.

## HICKS v. LAIDLAW.

*Vendor and Purchaser—Contract for Sale of Land—Default —Notice of Cancellation — Ineffectiveness — Action by Vendor to Declare Contract Abandoned—Delay—Specific Performance — Registration of Caveat — Claim for Removal — Costs—Cash Payment—Damages—Declaration of Extinction of Rights under Contract.*

**The judgment of ROBSON, J., 19 W. L. R. 525, was affirmed, upon the defendant's appeal therefrom; and, upon the plaintiff's cross-appeal, a clause was added to the judgment, in order to clear the plaintiff's title, declaring that the defendant's rights under the contract, in so far as the land was concerned, had ceased and were at an end.**

Appeal by the defendant and cross-appeal by the plaintiff from the judgment of ROBSON, J., 19 W. L. R. 525.

The appeals were heard by HOWELL, C.J.M., RICHARDS, PERDUE, and CAMERON, JJ.A.

A. Haggart, K.C., for the defendant.

A. W. Morley, for the plaintiff.

RICHARDS, J.A.:—The facts are fully set out in the judgment of the learned trial Judge.

It seems to me that the contention that the giving of the notice of the 9th January, 1906, by the plaintiff to the defendant, did wholly away with the provision in the contract that time should be of the essence of the contract, is untenable. In Parkin v. Thorold, 16 Beav. at p. 71, the Master of the Rolls did express such an opinion; but that view has been since held erroneous by Lord St. Leonards and by Jessel, M.R. The latter, in Barclay v. Messenger, 30 L. T. N. S. at p. 354, held that such an extension of time only substitutes the extended time for that originally fixed, without in any way doing away with the provision that time is to be of the essence of the contract.

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Whether the attempt to make the first postponed payment, four months or so after the time as extended by the notice of the 9th January expired, was too late to enable the defendant then to insist on specific performance of the contract by the plaintiff, need not now be considered. The return of the money by the plaintiff to the defendant, with a statement that she considered the contract cancelled and would not carry it out, was notice to him that she considered it at an end. Nevertheless, he then waited several years before making any claim, except by filing a caveat; and, in fact, made none until brought into Court by the plaintiff bringing this action. Even the mere making or persisting in a claim would not in itself have made his position better.

I take the law to be as stated in Parkin v. Thorold in that respect, where Lord Romilly says, at p. 73: "If one of two parties to a contract for the sale of land gives to the other notice that he will not perform the contract, and the person receiving the notice does not, within a reasonable time after the receipt of such notice, take steps to enforce the contract, Equity will consider him to have acquiesced in the abandonment of the contract, and will leave the parties to it to their remedies at law."

The word "abandonment," used by the noble and learned Lord in the above quotation, is perhaps too wide an expression. He means by it only an abandonment of the right to claim specific performance. The words following that word distinctly shew that that only is his meaning.

The result is, I think, that the defendant should be held, as he has been, as I understand it, by the learned trial Judge, to have no further claim whatever upon or rights in the land; but we cannot now say that the contract should be rescinded. The defendant may have common law rights to sue for damages, which nothing but the lapse of time under the Statute of Limitations might interfere with. The plaintiff in this action has asked to have the caveat which the defendant filed, taken off record. As between the plaintiff and defendant, I can see no reason why that should not be ordered; but the power to deal with caveats is limited by the Real Property Act itself.

Section 138 of that Act says: "In case of any caveat filed . . . the applicant or owner may, at any time before the caveator has taken proceedings thereunder, apply to the Court or a Judge or a Judge in Chambers . . . calling upon

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the caveator to shew cause why such caveat should not be discharged." It will be seen that the right to apply is limited to the "applicant or owner." There was not a tittle of evidence given in the case to shew that the plaintiff was the owner of or had any title, legal or equitable, to this land. She does, in one place, speak of having purchased it, but evidence of title cannot be given in that way. She, therefore, cannot be held to have shewn herself the owner. The word "applicant," as I understand it, in this section, refers only to a party applying to bring the title to land under the Real Property Act. It might be possible for the plaintiff, if she has an equitable title, to get the holder of the certificate of title to apply to have the caveat removed; but I express no opinion as to the method of doing that, as it is not now in question.

I think both appeals should be dismissed. But I agree with the conclusion arrived at by my brother Perdue as to the clause to be added to the judgment of the trial Judge.

The defendant to pay the costs of his appeal. No costs of the plaintiff's appeal to either party.

PERDUE, J.A.:—The facts of this case are set out in the judgment appealed from. The agreement contained a clause providing that, in case the purchaser should make default, the vendor might deliver or mail a notice calling upon the purchaser to make payment within a calendar month, and on the failure of the purchaser to make payment within that time, the contract should be void, and all rights of the purchaser under the agreement should cease, and the purchaser should have no right to reclaim moneys theretofore paid under the agreement.

It was clear from the evidence, and was in fact conceded on the argument, that the vendor had failed to comply with the terms of this clause; and that, consequently, she was not in a position to avail herself of it.

The contract, however, contains a further clause in these words: "And it is further agreed that time is to be considered the essence of this agreement." The question, therefore, is, what is the effect of this last provision in regard to the rights of the purchaser?

Under sec. 39 (m) of the King's Bench Act: "Stipulations in contracts as to time or otherwise, which would not



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before the passing of the Queen's Bench Act, 1895, have been deemed to be or to have become of the essence of such contracts in a Court of Equity, shall receive in all Courts the same construction and effect as they would prior to the passing of the Queen's Bench Act, 1895, have received in Equity." The rights of the parties, therefore, and the remedies to be accorded to them in this case, will depend upon the principles declared by the Courts of Equity.

The nature of the equitable jurisdiction is thus described by Lord Cairns in Tilley v. Thomas, L. R. 3 Ch. 61, 67: "A Court of Equity will relieve against and enforce specific performance, notwithstanding a failure to keep the dates assigned by the contract either for completion or for the steps towards completion, if it can do justice between the parties and if (as Lord Justice Turner said in Roberts v. Berry) there is nothing in the express stipulations between the parties, the nature of the property, or the surrounding circumstances, which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract." Courts of Equity held that they were not concluded by the letter of an agreement to do some act within a given time; and, where the party in default came before the Court with a sufficient excuse for non-compliance with the contract, and there was no unreasonable delay upon his part, relief might be granted to him. See Williams on Vendor and Purchaser, 2nd ed., pp. 58, 59.

In the present case the defendant made default in paying the instalment which fell due on the 1st December, 1905. The plaintiff appears to have written to him on several occasions demanding payment, but without effect; and, on the 9th January, 1906, she wrote him a letter, which was duly received by him, referring to the default and to the letters she had written him, and then stating: "I now give notice that, if payment is not forthcoming within thirty days after receipt of this, the agreement will be cancelled, and all your rights, title, and interest in lot null and void."

As previously stated, this letter must be held not to have been a compliance with the condition relating to the cancellation of the contract and the retaining of the purchase-money; but it was good as a notice calling upon the defendant to make his payment in accordance with the terms of the agreement, or that the agreement would be cancelled. It was, in

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effect, an extension of the time for payment of the overdue instalment, until after the lapse of thirty days from the receipt of the notice. The defendant failed to comply with this notice, and did not for several months make any tender of the moneys that were overdue.

It was argued that the plaintiff, by calling upon the defendant for payment and by extending the time by her letter of the 9th January, 1906, had waived the condition as to time being of the essence of the contract, at all events, as regards the then overdue payment. It appears to me that the effect of the letter was, that, notwithstanding the time that had passed, the plaintiff was still willing to give the defendant the further time to pay up; that the extension of time only waived the provision as to the essentiality of time during the extended period; and that, on the termination of that period, it again revived.

In Barclay v. Messenger, 43 L. J. Ch. 449, 456, Jessel, M.R., thus expresses the equitable rule to be applied: "If a man says a contract is to depend upon a payment of money by a certain day, and the party entitled to receive the money says, 'I will extend your time, I will give you a week or a month,' why that should put the party in a better position than if it had been originally put in the contract, I cannot conceive. It appears to me plain that a mere extension of time, and nothing more, is only a waiver to the extent of substituting the extended time for the original time, and not a total destruction of the essential character of time."

I think the judgment of the trial Judge was right in holding that the defendant by his delay had waived all rights to specific performance; that is to say, if the defendant had asked for specific performance in this case, which he has not done, the Court would have refused it. I think the trial Judge might have gone further and have declared that the defendant's right under the contract had been forfeited. If the defendant is no longer entitled to specific performance by his delay in the case, he would also be disentitled, under the same circumstances, to claim damages for non-performance. It may be that the purchase-money he had already paid has not been forfeited, but that has been allowed to him by the trial Judge, the plaintiff's costs being set off against it pro tanto.

I think that, in order to put an end to any further litigation, and in order to clear the plaintiff's title, there should be

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added to the judgment of the trial Judge a clause declaring that the defendant's rights under the contract, in so far as the land is concerned, have ceased and are at an end.

The judgment of the trial Judge will be varied in accordance with the foregoing and the defendant's appeal will be dismissed with costs. There will be no costs of cross-appeal.

HOWELL, C.J.M., and CAMERON, J.A., concurred.

*Judgment varied accordingly.*

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## MANITOBA.

MARCH 4TH, 1912.

COURT OF APPEAL.

## WOLFSON v. OLDFIELD.

*Appeal—Right of Appeal—Action by Vendor to Set aside Sale of Land—Agents of Plaintiff Made Co-defendants with Purchaser—Judgment Setting aside Sale—Finding of Fraud against Agents—Compliance with Judgment by Purchaser-defendant — Agents' Appeal not Competent.*

In an action against a firm of real estate agents and an investment company to set aside a sale of land by the plaintiff to the company, made through the intervention of the firm, the trial Judge found that the sale had been brought about by the fraud of a member of the firm, and gave judgment for the plaintiff, setting aside the sale, ordering the company to transfer the land to the plaintiff, upon the latter repaying the purchase-money received by him, and awarding costs to the plaintiff against all the defendants (18 W. L. R. 450). Both the agents and the company appealed from this judgment; but, before the hearing, the company abandoned their appeal and complied with the judgment by transferring the land to the plaintiff and paying his costs; and he refunded the purchase-money. The agents pressed their appeal because of the finding of fraud against them; but this finding was no part of the judgment as drawn up and entered; it was a finding made by the trial Judge in his reasons for judgment or in the process of arriving at his conclusion:—

*Held*, that the Court could not entertain the appeal; it was, in effect, an appeal, not from the judgment, but from the reasons for judgment.

Appeal by the defendants Oldfield, Kirby, and Gardner from the judgment of ROBSON, J., 18 W. L. R. 450.

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The appeal was heard by HOWELL, C.J.M., RICHARDS, PERDUE, and CAMERON, JJ.A.

C. P. Wilson, K.C., and J. B. Coyne, for the appellants.

H. Phillipps and H. W. Whitla, for the plaintiff.

PERDUE, J.A.:—This action was brought against Oldfield, Kirby, & Gardner, who are a firm of real estate agents, and the Real Estate Investment Company, to set aside a sale by the plaintiff to the company made through the intervention of the first-named defendants. The facts of the case are fully set out in the judgment appealed from. The substance of the plaintiff's contention was, that Oldfield, Kirby, & Gardner were his agents and employed by him to find a purchaser of the land in question at the best price available; that the plaintiff relied upon them to act in his best interests; that they, concealing from him the fact that they were acting for the purchaser and in the purchaser's interests, induced him to make the sale.

The learned trial Judge, Robson, J., found in favour of the plaintiff. The sale was set aside, and the defendants the Real Estate Investment Company were ordered to transfer the land to the plaintiff, upon the latter repaying the purchase-money received by him. Both Oldfield, Kirby, & Gardner and the Real Estate Investment Company appealed from this judgment. Before the hearing in this Court, the company abandoned their appeal and complied with the terms of the judgment. The company transferred the land to the plaintiff and paid his costs as ordered, and he refunded the purchase-money. The company were not represented on the argument of this appeal, or made parties to the appeal.

The matter now comes before the Court of Appeal in this anomalous position. The subject of the litigation is at an end, and all parties submit to the terms of the judgment, yet Oldfield, Kirby, & Gardner object that the trial Judge, in his reasons for judgment, or in the process of arriving at his conclusion, found that the action of Mr. Gardner was a fraud upon the plaintiff; and they desire to appeal against this finding.

The appellants object to no portion of the judgment as drawn up and entered. The judgment, as entered, only affects them in that they and the company are ordered to pay the plaintiff's costs, and these costs have already been paid by the

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company. All things ordered by the judgment to be done have been done, and no party to the suit desires to disturb this state of things.

Affidavit evidence was offered on this appeal to shew that there was no intentional fraud committed, and that Mr. Gardner intended to disclose to the plaintiff that he was acting for the purchaser; but, through an error in his office, a message he directed to be sent was not sent in the form he intended. It is not necessary to consider whether the affidavit evidence is material, or whether, if it had been received by the trial Judge, it would have affected his judgment in any important respect. If the evidence is not material, it need not be considered further. If it is material, and, as the appealing defendants contend, rebuts the alleged fraudulent intent, then the trial Judge's whole conclusion as to the plaintiff's right to recover would have to be considered on this appeal, a course which could not be taken in the absence of the Real Estate Investment Company and in view of the fact that the company have accepted and complied with the trial Judge's finding, so that the principals to the litigation, the vendor and the purchaser, are now concluded by the judgment.

There is no mention of fraud in the judgment as drawn up and entered. The finding of fraud could be reviewed by this Court only on an appeal from the whole judgment, and then only as an essential element found by the Judge in arriving at his conclusion. Where the real litigants have accepted that conclusion, and are now bound by it, a consideration by this Court of the finding of fraud would be purely academic.

Oldfield, Kirby, & Gardner's counsel contends that they were not proper parties to the suit. This exception, even if well taken, can have no effect upon the finding complained of. If they had not been made parties, the trial Judge might, in their absence, have made that finding if it was warranted by the evidence. In that case they, not being parties to the suit, would have had no status to bring an appeal.

I think the appeal must be dismissed.

CAMERON, J.A.:—This action was brought by the plaintiff to set aside the conveyance by him to the defendants the Real Estate Investment Company of certain lands sold to the company by the defendants Oldfield, Kirby, & Gardner, his agents. Relief was asked on various ground; but the learned trial Judge based his judgment in favour of the plaintiff on

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the single ground that the defendants Oldfield, Kirby, & Gardner did not, at the time of effecting the sale, disclose to the plaintiff that they were simultaneously acting for and advising the company in the purchase; and held that this was fraud on the plaintiff.

Formal judgment was accordingly entered, ordering that, upon payment by the plaintiff of the purchase-money received by him, the sale of the lands in question be rescinded; that the company thereupon convey the lands to the plaintiff and account for any interim rents and profits; and that the company and Oldfield, Kirby, & Gardner pay the costs of the action.

From this judgment the company appealed, asking to have the judgment set aside or varied and a judgment entered dismissing the plaintiff's action with costs. Oldfield, Kirby, & Gardner also appealed, asking for the same relief or for a new trial. When the appeal came before us, it was stated by counsel for the plaintiff that the terms of the judgment had been complied with; that the company had re-conveyed the lands in question to the plaintiff, who had been paid his costs; and that he was no further interested in the matter. He, therefore, took no part in the argument. We have thus been without the advantage of having the evidence analysed and discussed and the points of law brought before us examined from the plaintiff's standpoint.

Counsel for Oldfield, Kirby, & Gardner, therefore, restricted their appeal, making it in fact an application to the Court to revise the written reasons for judgment of the trial Judge. He urged that, upon the evidence at the trial and upon the further evidence submitted on the hearing of the appeal, it appears that the defendant Gardner intended and attempted to disclose to the plaintiff his relation to the investment company. In this he relied more particularly upon a letter from the defendants Oldfield, Kirby, & Gardner to the plaintiff's solicitors which was in evidence, and also upon the wording of the cable message sent by Oldfield, Kirby, & Gardner to the plaintiff on the 23rd January, 1911, as originally drafted He further pointed out that there was no allegation in the statement of claim that the non-disclosure complained of was with fraudulent intent, and insisted that such must be not only alleged but proved to hold these individual defendants liable. In other words, these defendants to be held liable must be brought within the rule laid down in Derry v. Peek, 14 App. Cas. 359.

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All these and other arguments were strongly urged upon us, and these individual defendants are certainly entitled to have them taken into consideration. But we are not asked to set aside or modify the judgment or send back the case for a new trial. We are really asked to write opinions or criticisms pointing out that the reasons assigned by the trial Judge for his judgment or the reasons by which he arrived at his conclusions are insufficient and erroneous, and that after the judgment had been accepted and acted upon by the purchasers. It is not an appeal at all, but an application of the kind I have stated, viz., to revise the written reasons for judgment of the trial Judge, a proceeding for which no precedent has been cited.

I have read the judgment in this matter prepared by Mr. Justice Perdue and agree with him that the motion must be refused.

HOWELL, C.J.M., and RICHARDS, J.A., concurred.

*Appeal dismissed.*

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## MANITOBA.

MARCH 4TH, 1912.

COURT OF APPEAL.

## GREEN v. STANDARD TRUSTS CO.

*Life Insurance—Policies Payable to Wife of Assured—Deduction by Insurers of Amounts of Loans and Premiums—Recovery by Wife from Estate of Assured—Deferred Instalments of Premiums—Policies Payable to Wife Specifically—Declaration in Favour of Wife as to other Policies — Testamentary Writing — Effect of — Will — Declaration Revoking Prior Declaration.*

W., a resident of Manitoba, had five policies of life insurance in force when he died. Three of these were, upon their faces, made payable to his wife, the plaintiff. The other two, being for $5,000 each, were made payable to P., the business partner of W., "during the existence of the co-partnership; thereafter to the executors, administrators, or assigns of the assured." P. had released all his claims under these policies to W., so that they became payable to the personal representatives of W., subject to any disposition he might make of them during his life. On the 29th May, 1909, W.

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executed two documents, in identical terms, referring to the P. policies, declaring that they and the assurances thereby effected should continue to be for the benefit of himself, his executors, administrators, or assigns, and subject to his disposal as he might see fit during his lifetime, but, if the same should be subsisting at his death and not sold, surrendered, assigned, or otherwise disposed of, then upon his death they should be for the benefit of his wife if she should survive him. W. during his lifetime had, with the concurrence of his wife, effected loans upon two of the policies payable to her. These loans were, after W.'s death, paid out of the moneys receivable under the policies, as were also the amounts of promissory notes given by W. for premiums and several half-yearly deferred payments for premiums. The defendants, executors and trustees under the will of W., collected the insurance moneys payable under the five policies, less the above deductions, and paid the whole amount to the plaintiff. W., by his will, gave all his estate, including all his life insurance, to his trustees upon trust: (1) to pay debts; (2) to pay certain legacies; (3) to invest the residue and pay the income to his wife during her life, and, upon her decease, to distribute the fund among his brothers and sisters. Then followed this declaration: "Any of my life insurance which is made payable to my wife specifically shall be her own estate moneys and property and are not intended to be affected by the terms of this will." The plaintiff claimed from the general estate of W. the amount of the loans and premiums deducted. The defendants counterclaimed the amount of the two P. policies; these were issued by a company having their head office in Ontario, and the insurance money under each policy was payable at the company's head office:—

*Held* (CAMERON, J.A., dissenting), that the documents of the 29th May did not contain such a declaration in favour of the wife as is contemplated by the Manitoba Insurance Act, R. S. M. ch. 83, sec. 7, or by the Ontario Act, R. S. O. 1897 ch. 203, secs. 159, 160. These documents did not create an absolute trust in favour of the wife; and were, in effect, testamentary documents, not executed in the form required by the Wills Act. The last paragraph of the will excepted from the operation of the prior parts of the will the policies made payable to the plaintiff specifically. The policies payable to P. in the first instance formed part of the general estate, and were subject to the trusts declared in the will.

*Foundling Hospital* v. *Crane*, [1911] 2 K. B. 367, followed.

*Held*, also, that the amounts of the loans and of the promissory notes were debts of W., payable out of his estate other than the policies specifically payable to the plaintiff; but the deferred payments of premiums were not debts of W., and were properly deducted from the amount receivable by the plaintiff.

Judgment of METCALFE, J., 19 W. L. R. 40, varied.

Appeal by the plaintiff from the judgment of METCALFE, J., 19 W. L. R. 40, dismissing the action and awarding the defendants relief on their counterclaim.

The appeal was heard by HOWELL, C.J.M., RICHARDS, PERDUE, and CAMERON, JJ.A.

W. F. Hull and J. K. Sparling, for the plaintiff.

W. R. Mulock, K.C., and J. W. E. Armstrong, for the defendants.

HOWELL, C.J.M.:—The deceased, Robert J. Walker, in 1889, at Brampton, in Ontario, while domiciled there, entered

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into a contract of insurance with the British Empire Insurance Company, whereby, in consideration of certain annual payments, his life was insured to the extent of $3,000, and by the terms of the policy the plaintiff, the wife of the deceased, became and was the beneficiary under the policy and entitled to the sum insured upon the death of the deceased.

In April, 1907, the deceased executed an assignment of that policy to Arthur & Co., to secure payment of a debt which the deceased then owed to Arthur & Co., and the plaintiff, his wife, joined with him in executing this assignment. The debt to secure which this assignment was given was clearly a debt owing by the deceased to the assignees of the policy, and it was executed in Manitoba while the deceased was domiciled here.

In the year 1893, while the deceased was domiciled in Ontario, he insured his life for the sum of $5,000 with the Ontario Mutual Life Assurance Company, which company at that time had their head office within this province, and, by the terms of the policy of insurance issued by that company, the plaintiff became and was the payee and beneficiary in that policy and entitled to receive the money on the death of the deceased.

In the year 1901, while the deceased was still domiciled in Ontario, he applied to the last-mentioned insurance company for a loan from the company of $500, and offered as security the last mentioned policy of insurance. For the purpose of carrying this matter through, a document was drawn up and signed by the plaintiff and the deceased, and the document really amounts to an acknowledgment that the plaintiff received this money and created a lien and charge on the policy, and the husband, by the terms of the document, joins and consents to the effecting of the loan, and both husband and wife covenant to pay the debt; and the document further declares that, if, before the loan is repaid, the policy becomes a claim, the company are authorised to retain the amount of this loan and interest out of the sum insured. It appears that the loan was purely and simply a loan made to the husband at his request; but the charge was apparently taken in that form because the wife was the beneficiary and the payee. It seems to be clear that the debt was really a debt due by the husband, and the proceeds of the loan were received by him.

Section 7 of ch. 83, R. S. M., and sec. 159 of ch. 203, R. S. O., are alike in making a peculiar provision where a policy

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of insurance is assigned to or made payable to the wife or the children of the insured. It is really a statutory method of settling property upon them beyond the reach of creditors or executors. These sections alike declare that in such a case a trust in created between the insured and the beneficiary in favour of the latter. By these policies, therefore, the plaintiff became the owner of the fund represented by such policies. At the request of the deceased, however, she united with him in mortgaging or charging this property to secure advances to him, for the repayment of each of which he became personally liable, and each was a debt of his which he should repay.

When the deceased executed, with his wife, the transfer or mortgage of the first-mentioned policy, he was domiciled in Manitoba, where he remained until his death; but, apparently, he was domiciled in Ontario when he united with his wife to execute the charge on the second-mentioned policy. According to the law of Ontario, once having made the policy payable to his wife, the deceased had no power to convert it into a policy payable to his executors; but the law is different in this province; and let us assume that the law of Manitoba applies to both of these cases. As soon as these policies were issued and made payable to the plaintiff, as between her and the insured, she was the beneficiary, and the moneys were her own property and estate, and the husband was a mere trustee for her, and upon his death she was entitled to receive this money.

Section 15 of our statute, however, provides a method by which the husband can deprive his wife of the rights above set forth. It declares that he can, by an instrument in writing, absolutely revoke the benefit previously given, and may reapportion or alter or revoke the benefits "or divert the insurance money wholly or in part to himself or his estate." By virtue of the statutes above referred to, and by the policies of insurance being made payable to her, the plaintiff was given peculiar statutory rights, intended, no doubt, for her special benefit; and it would seem just to require clear and conclusive language that the deceased intended to invoke the powers given him under sec. 15 of our statute. If these loans had been paid off in his lifetime, no one would doubt that the original rights secured to the plaintiff would have been restored to her, notwithstanding those documents executed by her.

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I do not find in either of the documents referred to that the deceased did by instrument intend to divert the insurance money or any part of it to himself or to his estate; and I do not think that either of these documents has deprived or was intended to deprive her of the insurance money secured by these policies.

One of the premiums of insurance of the second-mentioned policy matured some months prior to the death of the insured; and, in order to continue the policy, the deceased gave his promissory note for this premium, and the company accepted the note as payment of the premium. This note matured shortly after the death of the deceased; and, pursuant to one of the conditions in the policy, the company retained enough out of the policy to satisfy this note, thus reducing the amount payable to the plaintiff also by the amount of this note.

The plaintiff's position is, that parts of the funds payable to her under these policies have been diverted to pay the debts of the deceased: because the deceased had not paid his debts, her property has been charged with the payment of them. She has received from the companies the amount due on the policies, less the two sums for which the policies were charged as above-mentioned, and less the promissory note for the premium; and I think the estate should make good to her the sums so retained from her.

If the will of the deceased can in any way modify the effect of these written documents, it seems to me that it fortifies the plaintiff's position. The 5th clause is: "Any of my life insurance which is made payable to my wife specifically shall be her own estate moneys and property and are not intended to be affected by the terms of this will."

That clause, read critically, would mean the whole of the life insurance that was made payable specificially to her, not that part of it which had not been pledged to pay his debts.

In another portion of the will there is a specific devise for the payment of all his just debts. This promissory note for the premium of insurance and these two loans above referred to are his just debts: and I see no reason why they should not have been paid by the executors, thus freeing the policies from any claim.

I see no reason for differing from the conclusion arrived at by the learned trial Judge as to the disposition of the moneys paid under the Peace policies, for two reasons. First,

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the assignment under which the plaintiff asserts her claim provides that the policies shall be and remain for his (the deceased's) own benefit and subject to any disposition he may make of them during his lifetime, and if "not assigned or otherwise disposed of then upon my death . . . they . . . shall be for the benefit of my wife." The will did otherwise dispose of them, and I agree with the conclusion of the trial Judge. Second, upon the authority of Foundling Hospital v. Crane, [1911] 2 K. B. 367, the document above in part recited is a testamentary document, and has not been executed in the form required by the Wills Act.

The appeal must be allowed in part, and the judgment must be amended so as to declare that the plaintiff is to retain out of the moneys received by her from the Peace policies the three sums above referred to retained by the insurance companies out of the policies payable to her.

The plaintiff will also retain out of the above-mentioned moneys her costs of this appeal.

RICHARDS, J.A.:—The plaintiff is the widow of Robert James Walker. In his lifetime he affected five insurance policies upon his life. Of these, three were made directly payable to his wife. The other two were made payable to a Mr. Peace, with whom he apparently has business relations. Mr. Peace subsequently assigned the benefit of those two policies to Walker. At the time of Walker's death, there was no insurance on his life except that effected by the above policies.

The plaintiff and Walker borrowed money on two of the policies, which were made payable to the plaintiff on their faces. The loans were applied for and got for Walker's own benefit, and he received the moneys for his own purposes. At the time of his death, these loans had not been repaid.

A few days before his death, Walker executed, as to each of the policies which had been assigned to him by Mr. Peace, a document of which the following is a copy:—

"I, Robert James Walker, the assured named and described in policy No. 65718 issued by the Mutual Life Assurance Company of Canada, do hereby, in pursuance of the statute in that behalf, declare that the said policy and the assurance thereby effected shall continue to be for the benefit of myself, my executors, administrators, or assigns, and subject to my disposal as I may see fit during my lifetime, but, if the same be subsisting at my death and not sold, surrendered,

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assigned, or otherwise disposed of, then upon my death it shall be for the benefit of my wife Clara Celestia Walker, if she survives me." In the other, the number was 65719, but it was otherwise the same as the above.

Thereafter, he made his will, by which he purported to give to his trustees, upon certain trusts, all his estate of every kind, "including all my life insurance." The same will contained the following clause: "Any of my life insurance, which is made payable to my wife specifically shall be her own estate moneys and property and are not intended to be affected by the terms of this my will."

As to certain of these policies, Walker, before his death, had given promissory notes for premiums; and certain other premiums for which he had not given promissory notes, but which the companies had the right to deduct from the face of the policies, also come in question.

After Walker's death, his widow received the proceeds of both of the policies which had been made payable on their faces to Peace, the company, however, deducting, in respect of such policies, the amounts of the promissory notes given by Walker for premiums and the amount of such other premiums as they were entitled as above-mentioned to deduct. She also received, in the same way, the amount of the policy made payable on its face to her, but on which no sum had been borrowed.

As to the two policies on which loans had been made, she received the amounts payable, less the amount of the loans and premiums for which notes had been given and the other premiums as above-mentioned.

The plaintiff brought this action against Walker's executors, to compel them to pay to her the amount which had been deducted to pay the loans on the two policies upon which loans had been made. The executors disputed her right to this relief, and counterclaimed, asking that she be compelled to pay to them the amount received by her on the two policies which had originally been made payable to Peace.

The trial Judge, Mr. Justice Metcalfe, held that she was not entitled to be reimbursed out of Walker's estate, the amount deducted for loans, and held also that she was compellable to pay to the estate the amount received by her on the Peace policies. From that decision the plaintiff appealed.

The parties resided in Manitoba when the loans were made, and I think the law of Manitoba is applicable.

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Sections 7 and 15 of the Life Insurance Act (eliminating such portions as are not material to this case) are as follows:—

"7. In case a policy of insurance heretofore or hereafter effected by a married man on his life is expressed upon the face of it to be for the benefit of his wife . . . or in case he . . . by any writing identifying the policy . . has made . . . a declaration that the policy is for the benefit of his wife . . . such policy shall inure, and be deemed a trust, for the benefit of his wife for her separate use . . . and so long as any object of the trust remains, the money payable under the policy shall not be subject to the control of the husband or his creditors, or form part of his estate, when the sum secured by the policy shall become payable . . ."

"15. If, in case of a policy of insurance heretofore or hereafter effected by a man . . . it is expressed on the face to be for the benefit of or has been . . . under this Act appropriated for the benefit of his wife . . . then the insured may, by an instrument in writing . . . absolutely revoke the benefit or declaration or appropriation previously made . . . and divert the insurance money . . . to himself or his estate . . ."

Under the wording of sec. 7, it seems to me that, although Walker was in no way bound to keep alive the policies payable on their faces to his wife, yet, so long as he did so, such policies were, as against both him and the company, a trust for the benefit of his wife for her separate use, unless he executed a revocation and appropriation under sec. 15, which he did not do. The position, then, is this, with regard to the policies on which the loans were made, that they were the wife's separate property, and moneys were borrowed upon them for Walker's benefit. I think that there is no doubt that, in those circumstances, his estate was liable to repay her the moneys retained to pay these loans, just as he would be responsible to repay her directly a loan made out of her separate estate to him.

As to the Peace policies, however, I think the learned trial Judge was right in holding that the plaintiff was not entitled. If they became her property at all, they became so either by virtue of the above-recited declaratrion of the 29th May, 1909, or by virtue of the will.

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Dealing first with the will. If the Peace policies were his, I do not think the will passed them to the widow. He distinctly bequeaths all his life insurance to his trustees. By that he must be held to have meant such as he had control over. The provision in the fifth clause, above quoted, by which he says his will is not to affect insurance payable to his wife specifically, seems to me only to refer to policies payable to her on their face; and his object, probably, was to prevent his will from operating, with regard to these last-named policies, as a revocation, or appropriation, under sec. 15. By the word "specifically," I think, he means "on their face," or "as originally made."

It was urged that, in bequeathing his life insurance to the trustees, he may have supposed that he had other policies than the five which he had. I can see nothing in that contention.

It is argued, however, that the declaration of the 19th May is an appointment of the Peace policies in his wife's favour. The first part of that declaration simply provides, in effect, that they shall be his own during his lifetime; and they would be that without any such declaration; so that, in so far as that goes, the declaration amounts to nothing, and does not affect the policies in any way. The part that the plaintiff has to rely on must be the last clause: "But if the same be subsisting at my death and not sold, surrendered, or otherwise disposed of, then upon my death it shall be for the benefit of my wife." Except as to that last clause, nothing is attempted to be effected by the declaration.

In the case of Foundling Hospital v. Crane, [1911] 2 K. B. 367, it is held that a document, executed and delivered by a person, to take effect only at the time of his death, is a testamentary document, and is invalid unless executed according to the provisions of the law with regard to the execution of wills. This is also held in Habergham v. Vincent, 2 Ves. 204, and In the Goods of Morgan, L. R. 1 P. & D, 214.

I incline to the belief, therefore, that, as this declaration was not to come into force until the time of Walker's death, and was not executed as the law requires with regard to testamentary documents, it was of no effect.

But, if it should be that the provisions of the Life Insurance Act, as to appropriations of policies, extend far enough to make valid an appropriation of this kind, though not made by will—and I cannot, on reading the provisions of

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the Act, see that they do—yet there is a further matter, which, I think, is fatal to the plaintiff's claim. This proviso in the declaration means that, if, at the time of his death, the policies are not disposed of, then they are to be for the benefit of the wife. Section 22 of the Manitoba Wills Act says that every will shall be construed to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appear by the will. No such contrary intention is shewn in Walker's will; and, therefore, under the provisions of sec. 22, the will, speaking immediately before Walker's death, disposed of these Peace policies: and they, therefore, had, at the actual time of his death, been disposed of, so that the condition on which the plaintiff should take them under the declaration had failed, as a result of this disposal.

I think the plaintiff is entitled to be repaid, from the general estate, the amounts deducted from two of the policies payable to her in respect of loans made upon them, and also to be repaid in respect of such policies and of the other policy made payable on its face to her, any sums deducted for promissory notes given for premiums by Walker. As against that, I think she must repay to the general estate the amounts received by her upon the Peace policies. He was not bound to pay the premiums for which he had not given his notes. They were, therefore, not his debts, and his estate cannot be held liable for them.

PERDUE, J.A.:—The plaintiff was the wife of the testator Robert James Walker. After his death she married one Green. Walker, who was a resident of Winnipeg, had five policies of life insurance in force when he died. Three of these were, upon their faces, made payable to his wife, the plaintiff. The other two policies, being for $5,000 each, were made payable by their terms to "W. T. Peace, the business partner of the assured, during the existence of the co-partnership; thereafter to the executors, administrators, or assigns of the assured." Peace had released all his claims under these policies to Walker, so that the same became payable to the personal representatives of the latter, subject to any disposition he might make of them during his life.

On the 20th May, 1909, Walker executed two documents, in identical terms, referring to the Peace policies. One of



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these documents, sufficiently shewing the contents of both, is set out in the judgment appealed from.

The testator during his lifetime had, with the concurrence of his wife, effected loans upon two of the policies payable to her. These loans were, after the testator's death, paid out of the moneys receivable under the policies. The amounts of several promissory notes given by him for premiums, and also several half-yearly deferred payments for premiums, were deducted by the insurance company from the amounts payable under the policies issued by the company. The plaintiff claims that the amount of the loans and of the premiums so deducted should be paid to her out of the general estate of the deceased.

The defendants the Standard Trusts Company and the wife of the deceased are the executors and trustees under the will of the testator. The trusts company collected the insurance moneys payable under the five policies, less the above deductions, and paid the whole amount to the plaintiff.

The testator by his will, the material parts of which are set out in the judgment of Metcalfe, J., devised all his estate, including all his life insurance, to his aforesaid trustees upon trust: (1) to pay debts; (2) to pay certain legacies mentioned; (3) to invest the residue and pay the income to his wife during her life, and, upon her decease, to distribute the fund among his brothers and sisters named in the will. Then follows a declaration in the following words: "Any of my life insurance which is made payable to my wife specifically shall be her own estate moneys and property and are not intended to be affected by the terms of this will."

The defendants counterclaim for the amount of the two policies of life insurance which had be made payable to Peace.

It is contended by the plaintiff that the documents of the 29th May were sufficient declaration under the statute and that their effect was to confer upon her the benefit of the policies. There was some discussion as to whether the Ontario or the Manitoba law applied to the two policies in question, both having been issued by a company having their head office in Ontario, and the insurance money being payable under each policy at the company's head office. I do not think it is necessary to consider whether the law of Ontario or the law of Manitoba should be applied in regard to the questions that arise in this case. The Peace poli-

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cies were not, by their terms, payable to the wife of the assured; and the main question is, did the documents of the 29th May contain such a declaration in favour of the wife as is contemplated by our Life Insurance Act, R. S. M. ch. 83, or by the Ontario Act, R. S. O. 1897 ch. 203, secs. 159, 160? I am unable to find any substantial difference between the provisions of the Manitoba Act and those of the Ontario Act, in so far as this question is affected.

By sec. 7 of the Manitoba Act (corresponding in effect with sec. 159, clause 1, of the Ontario Act), where a policy of life insurance is expressed on its face to be for the benefit of his wife, "or in case he has heretofore indorsed . . . or by any writing identifying the policy by its number or otherwise or by his will, has made . . . a declaration that the policy is for the benefit of his wife . . . , such policy shall inure and be deemed a trust for the benefit of his wife for her separate use."

In order to create the trust in favour of the wife under the foregoing provision, where the policy is not on its face payable to her, there must be an instrument in writing signed by the husband declaring the insurance to be for her benefit. The words used in the writing must, at all events, be as full and as operative as would be necessary in order to create an immediate declaration of trust. "They must be clear, unequivocal, and irrevocable . . . words that shew that the donor means, at the time he speaks, to divest himself of all beneficial interest in the property:" Grant v. Grant, 34 Beav. 623. The declaration under the Act should be positive and unconditional, and should take effect at once.

The instruments of the 29th May declare that the policies and insurance shall continue to be for the benefit of the assured, his executors, administrators, or assigns, and subject to his disposal as he may see fit during his lifetime. It is only at his death, and if the insurance is then subsisting and not sold, surrendered, assigned, or otherwise disposed of, that it shall be for his wife's benefit, if she survives her husband. This is not a positive, unconditional declaration that the insurance is for the benefit of the wife. There is no intention that it shall take immediate effect; on the contrary, any effect it can possibly have is postponed until after the death of the husband. It is conditional, qualified, and uncertain. It does not confer upon the wife any actual

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benefit or interest in the insurance moneys during the lifetime of her husband. It retains the insurance under the control of the husband, although the purpose of the Act was to enable him to create a trust in favour of his wife and children or his wife alone, which would, while it existed, remove the insurance from his control and from the control of his creditors.

The instruments of the 29th May are also open to another objection, which appears to me to be fatal to their validity. By their terms, the husband retains the property in and benefit of the insurance and complete power of disposal over it during his life, but upon his death it is to be for the benefit of his wife if she survives him. The instrument does not operate in favour of the wife until after his death. This is clearly a testamentary document, and, not being executed in the manner prescribed by the Wills Act, it is inoperative. In Habergham v. Vincent, 2 Ves. 204, 231, Buller, J., stated it to be established law that "an instrument in any form, whether a deed poll or indenture, if the obvious purpose is not to take place till after death of the person making it, shall operate as a will. The cases for that are both at law and in equity; and in one of them there were express words of immediate grant, and a consideration to support it as a grant: but, as upon the whole the intention was, that it should have a future operation after death, it was considered as a will." The same principle was adopted in In the Goods of Morgan, L. R. 1 P. & D. 214, and in the very late case of Foundling Hospital v. Crane, [1911] 2 K. B. 367.

I am, therefore, of opinion that the instruments of the 29th May did not confer the benefit of the insurance upon the plaintiff.

The last paragraph of the will clearly excepts from the operation of the prior parts of the will the policies made payable to the plaintiff specifically. The other two policies, those payable to Peace in the first instance, form part of the general estate and are subject to the trusts declared in the will.

The loans effected by the testator upon two of the policies payable to his wife were made for his benefit. Although the plaintiff joined with him in pledging the policies as security for the loans, and signed promissory notes jointly with her husband for the amounts borrowed, all the proceeds of the loans were paid to the husband, and she received no part of

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them. There loans should be paid out of the testator's estate not specifically devised: Re Tatham, 2 O. L. R. 343; Re McGarry, 18 O. L. R. 524, 528; Hall v. Hall, [1911] 1 Ch. 487.

At the death of the testator there were three promissory notes unpaid which had been given by him for premiums due to the insurance company. The amounts of these notes were deducted by the company from the insurance money when making settlement. These were also debts of the testator and payable out of his estate, other than the policies specifically payable to the plaintiff.

There were also deducted by the company from the insurance money three deferred half-yearly payments upon premiums. There half-yearly payments fell due after the death of the testator. By the contract of insurance, the balance of the whole year's premium was to be deducted from the insurance on making settlement of the claim. These deferred payments were not debts of the testator. He was not bound to keep up the insurance. Making payment of the premiums was a voluntary act upon his part, in so far as the devisees are concerned. I think the deferred premium upon each policy should be deducted from the amount of the policy.

The judgment of Metcalfe, J., should be varied in accordance with the foregoing. The Registrar of the Court should, if necessary, ascertain the amount to be repaid by the plaintiff to the defendants in respect of the Peace policies, and this amount she should be ordered to pay to the defendants.

CAMERON, J.A.:—In the case of the insurance policy with the British Empire Mutual Life Assurance Company, the loan thereon was secured by the promissory note of the insured and his wife, the present plaintiff, and by an assignment of the policy. In the case of one of the policies with the Mutual Life Assurance Company of Canada, the loan was secured by an assignment of the policy to the company, containing the joint and several covenants of the insured and his wife for repayment. The proceeds of these loans went to the insured. Both policies were made payable to the plaintiff. The amounts of the loans were deducted from these policies when payment was made, after the death of the testator, and as to them the question is, whether these deductions are properly payable out of the proceeds of the policies or out of the testator's estate in the hands of the executor and executrix.

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These policies are payable on the face of them to the wife, and, therefore, are not affected by the will. The will directs the trustees to convert all the testator's real and personal estate and out of the proceeds "to pay all my just debts." Thus the testator charged all his estate with his debts, and "the Courts have construed the expression 'debts' with considerable latitude." "Under a charge of 'debts' in a will are included all liabilities to which the personal estate is liable; as damages for breach of a covenant occurring after the testator's death:" Jarman on Wills, p. 1989, note.

By sec. 7 of the Life Insurance Act, R. S. M. ch. 83, a policy of insurance effected by a married man for the benefit of his wife creates a trust in her favour, and the moneys payable thereunder do not, so long as any object of the trust remains unperformed, form part of the estate of the insured or become subject to his debts. By sec. 22, the insurance money is to be free from the debts of the insured and is to be paid according to the terms of the policy. Here the insured procured advances from the insurance companies for his own benefit, and gave his promissory note in the one case and his covenant in the other to repay the amounts of the several loans. Had he lived and repaid the loans, no question would have arisen. Because of his death before this was done, is the value of her interest on the policies to be impaired? The object of the statute was to secure to the wife the payment of the policy free from any claims by executors or creditors. I cannot read the assignments as revocations pro tanto under sec. 15 of the Act. It was clearly never the intention of the testator that they should operate as such, or they would have complied more plainly with the strict wording of that section. The testator was in the position of borrowing money upon the security of policies in which by the statute his wife had the beneficial ownership. It was open to him absolutely to revoke that ownership, but he did not choose to do so. The wife was in the position of lending the husband her property and her name as security for his debt. Under the circumstances, it seems to me that the amounts deducted from the policies must be paid out of the testator's estate, and that the plaintiff must succeed on this branch of the case.

As to the counterclaim, that depends altogether upon the construction to be given to the wording of the declarations and the will. The declarations are dated the 29th May, the will was made the 1st June, and the testator died on the 9th

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June, in the year 1909. There can be no doubt that, under the appropriations of the 29th May, the policies affected thereby were made payable on the testator's death to the plaintiff specifically, as she is referred to therein as his wife, and by name also. Had these two been the only policies payable to her, and had the three other policies been payable to the testator's estate, or had the husband died intestate, I think the amounts payable under those two policies would have been paid over to the widow without any question. It is argued, however, that there were but five policies in all, three of them payable to the plaintiff on their faces, and that, therefore, to make the words in sub-clause 5 of clause 3 of the will cover all the policies would be inconsistent with the previous part of clause 3, by which the testator devised all his real and personal estate, "including all my life insurance." Nevertheless, is it clear that, if there be any inconsistency in different parts of the will, the later part must govern. This is the rule, and the effect of it, under the circumstances of this case, is practically to reject the words "including all my life insurance" as superfluous, or as referring to insurance the testator thought, mistakenly, he had previously effected, or insurance that he might effect after making his will. I fail to see how any distinction can be drawn between the policies payable specifically to the wife on their face and those payable specifically to the wife by a subsequent document. In fact, they are all of them made payable to the wife and to no other person, and therefore payable to her specifically.

In construing the language of the declarations or appropriations, it appears to me that, though expressed to be pursuant to the Ontario Act, they are sufficient and effective under our own statute, which must govern. The benefit of these policies is conferred upon the wife, but that benefit is to come into being only upon the death of the testator, and if the policies are then subsisting and "not sold, surrendered, assigned, or otherwise disposed of."

It is argued that these appropriations are not in accordance with the statute, that they are for the benefit of the insured, his executors, administrators, or assigns, and subject to his disposal in his lifetime and for the benefit of the wife only upon the death of the insured, if the policies are then subsisting, and that they are, therefore, ineffective and invalid. And yet, if these declarations had been in these

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words, "I declare that policy No..... in the Ontario Mutual Life Assurance Company is for the benefit of my wife under the provisions of ch. 83, R. S. M.." what would have been the result? It is clear that the insured could still, under sec. 15, absolutely revoke the benefit, alter or revoke it, or divert the insurance moneys wholly or in part to himself or his estate. So that the insured could do by law all that he is expressly empowered to do by the words of the appropriations. All of which goes to shew that the appropriations are in accordance with the statute, and therefore effective.

As the statute authorises the insured to appropriate the whole policy for the benefit of the persons therein named, it must follow that he can appropriate a part of the policy, and that he can, instead of making a gift absolute, make a gift conditional or contingent. In any event, here, where the benefit is contingent upon his death and upon the policy being then subsisting, and not previously thereto sold or otherwise disposed of, the benefit of the policy is conferred upon the wife, on such terms as the statute contemplates.

It was further argued that the appropriations, being in fact gifts to take effect upon the death of the donor, are testamentary instruments, and that, as they do not conform with the provisions of the Wills Act as to formalities of attestation, they are void. On this point we were referred to Foundling Hospital v. Crane, [1911] 2 K. B. 367, 80 L. J. K. B. 853, and the cases therein quoted. In principle it is difficult to distinguish those cases from this one now before us. But any appropriation for the benefit of a wife or children under the Act is open to the same objection. These appropriations are, in my opinion, in accordance with and authorised by the statute. They have the characteristics of testamentary instruments, as have all other similar documents under the Act; but the legislature, fully aware of this, gave such documents the powers and qualities set forth in secs. 7, 8, 15, 28, 29, and other sections of the Act. They are special statutory instruments and are wholly without the provisions of the Wills Act.

I do not consider that the testator, when he uses the words in his will, "I give devise and bequeath unto my said trustees all my real and personal estate of every nature and kind, including all my life insurance," thereby revoked the appropriations previously made. Had it been the wish of

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the testator by his will to revoke the benefits already declared or otherwise deal with them in accordance with the provisions of sec. 15 of the Act, it seems to me that he would have expressed his intention in language more definite and appropriate, and more in conformity with that employed in that section.

In any event (and this is the view that appeals to me most strongly), the policies in question, being made payable by the appropriations to the wife specifically, and thus expressly excluded from the operation of the will, are unaffected, and cannot be held to be disposed of, by it.

In my judgment, therefore, the policies covered by the declarations are payable to the plaintiff and not to the executor and executrix.

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## MANITOBA.

MARCH 4TH, 1912.

COURT OF APPEAL.

## LOVE v. MACHRAY.

*Negligence—Tenant of Land Pasturing Horse thereon — Liability of Owner for Loss of Horse Falling into Uncovered Well — Common Law Liability — Provisions of Municipal By-law.*

The defendant held land as a bare trustee for a club. The club let the land to C., who entered into an arrangement to pasture the plaintiff's horses upon the land. One of the horses fell into an uncovered well upon the land and was so injured that it died:—

*Held*, that the defendant, not being in control of the premises and not having undertaken to keep them in repair, owed no duty to C. or the plaintiff, and was not responsible at common law for the plaintiff's loss.

*Held*, also, that the defendant was not liable by reason of the provisions of a municipal by-law (set out below) requiring wells in the municipality in which the land was situated to be kept covered.

Judgment of the County Court of Portage la Prairie reversed.

Appeal by the defendant from the judgment of the County Court of Portage la Prairie in favour of the plaintiff in an action for damages for loss of a horse.

The appeal was heard by HOWELL, C.J.M., RICHARDS, PERDUE, and CAMERON, JJ.A.

C. H. Locke, for the defendant.

W. J. Cooper, K.C., for the plaintiff.

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RICHARDS, J.A.:—The defendant has an equitable title to certain property under an agreement to purchase. Certain persons, for whom he alleges he holds it in trust, let the property to one Cooper, who entered into possession. Cooper agreed with the plaintiff, for a consideration, that the plaintiff might pasture horses on the land. One of these horses fell into an uncovered well on the land and was injured so that he died. The plaintiff sued the defendant in the County Court of Portage la Prairie for damages for the loss of the horse.

As Cooper was in possession of the property, and the defendant is not shewn to have had any right to enter on the property to cover the well, and it is not even shewn that the defendant knew that there was an uncovered well on the property at any time at which he may have had control, it seems to me that there is no common law liability.

It is contended, however, that the defendant is liable because of a by-law of the Rural Municipality of Portage la Prairie, within which the land is situate.

Section 635 of the Municipal Act gives the municipality power to pass a by-law for compelling or regulating the enclosing or covering up of all wells in the municipality that are open or insufficiently guarded, by the owners or occupants of the land whereon such wells are situate.

The by-law says that every well within the municipality that is not enclosed within a lawful fence shall be covered with a sufficient and proper covering, and shall at all times be kept covered except when necessarily opened for the purpose of obtaining water for the purpose of cleaning or repairing said well; and also that any owner or occupant of any land upon which such well may be situate shall cover the said well with such good and sufficient covering, within two days after service of written notice on him from the clerk of the municipality or any ratepayer within the municipality, calling upon him to cover such well. It is argued that there is no liability to keep the well covered until after such notice has been given. But that need not now be considered, I think.

The by-law provides for a penalty by fine or imprisonment, in case of default, and also that, if the owner or occupant makes default, the well may be covered by the municipality and the costs assessed and levied against the lands.

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Though the word "owner" is used in this by-law, it seems to me that it can only mean an owner who has power to enter and cover the well; otherwise it would impose a penalty upon a person for not doing that which he is unable to do.

In the present case, Cooper was in possession as a tenant; and, in the absence of evidence to the contrary, the presumption is, that the defendant had no power to enter. I cannot think that the intention of the by-law, or of the statute, could be that, in such a case as this, the owner should be subject to punishment, or open to any liability, for not doing that which is to him impossible.

I would reverse the finding of the learned trial Judge in favour of the plaintiff, and enter judgment in the County Court for the defendant with costs, including a counsel fee; the defendant to have the costs of this appeal.

PERDUE, J.A.:—This is an action brought to recover damages for the loss of a horse which was killed by falling into a well. The evidence shews that the defendant had entered into an agreement for the purchase of a section of land from the plaintiff and certain members of the plaintiff's family. The land was held by the defendant as a bare trustee for the Oakland Club, and the defendant had no personal interest in the land. The Oakland Club let the land to one Cooper, and Cooper entered into an agreement with the plaintiff to pasture several of the plaintiff's horses upon the land. While the horses were so pasturing upon the land, one of them fell into an uncovered well and sustained such injuries that it died.

This action is brought against the defendant, as the owner of the land, to recover damages for the loss sustained by the plaintiff. The learned County Court Judge expressed a doubt as to whether the defendant was liable or not, but entered a verdict for the plaintiff, assessing the damages at $200.

The defendant was not in control of the premises, and had not undertaken to keep them in repair. The tenant of the premises was the person, if any, on whom the responsibility rested of keeping the well in question fenced or covered. If there was no duty owed by the defendant to the tenant respecting the safe condition of the well, there was none due to a stranger: Lane v. Cox, [1897] 1 Q. B. 415, 417;

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Cavalier v. Pope, [1904] 2 K. B. 757, affirmed [1906] A. C. 428. This position was indeed conceded by the plaintiff's counsel on the argument, and the plaintiff's case was rested upon the by-law of the municipality and upon the legal liability which it was argued followed thereon.

This by-law, being No. 155 of the Rural Municipality of Portage la Prairie, passed under the authority of sec. 635 of the Municipal Act, provides as follows:—

"1. That every well within the Rural Municipality of Portage la Prairie that is not enclosed within a lawful fence shall be covered with a sufficient and proper covering and shall at all times be kept covered except when necessarily opened for the purpose of obtaining water or for the purpose of cleaning or repairing said well.

"2. That any owner or occupant of any land upon which such well may be situated within the municipality shall cover the said well with such good and sufficient covering, within two days after service of written notice on him calling upon him to cover such well, which notice may be given by the clerk of the municipality or by any ratepayer within the municipality."

Clause 3 provides that any person violating the provisions of the by-law, or failing to comply with the same, shall be subject, on conviction before a Justice of the Peace, to a fine or to imprisonment for twenty-one days.

Clause 4 provides that, in the event of any owner or occupant of any land on which there is any such uncovered well making default in covering the well as aforesaid, the well may be covered by the municipality and the costs charged against the owner and added to his taxes.

Clause 5 provides that nothing in the by-law shall prevent any party aggrieved from recovering compensation for damage sustained by any breach of the by-law from the person or persons whose default caused the damage.

Clause 6 defines the word "well" as including any hole or excavation made or used for the purpose of obtaining water.

Without discussing the broad question whether a person who has been injured by reason of a breach of the by-law can maintain an action against the person on whom the duty is imposed, it is clear that, unless the person sought to be charged has committed a breach of the by-law and become liable to the penalty provided, the action will not lie. Look-

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ing at the by-law in question, it is clear that the defendant does not fall within the provisions of clause 1. That clause plainly applies to the person who is in occupation of the premises, whose duty it would be to see that the well was kept covered.

Where the owner of land has leased the land to a tenant who is in use and occupation of the land, it would be unreasonable and absurd that the municipality should, under stress of fine or imprisonment, compel the owner of the land to enter upon it repeatedly to see that the well was kept in proper condition; and, in the case of a well that was in actual use, to compel the landlord to see that the tenant covered the well on each occasion after making use of it for the purpose of drawing water.

It is equally clear that clause 2 of the by-law does not apply to the defendant in this case. There is no pretence that any notice was served upon him, either by the municipality or by any other person calling upon him to cover the well; and, without notice, there is no liability under the clause. There is nothing else in the by-law which will afford any assistance to the plaintiff in establishing his claim.

I think the plaintiff failed to shew any liability on the part of the defendant. The appeal should be allowed, the verdict in the County Court set aside, and a verdict entered for the defendant. The plaintiff will have to pay the costs of this appeal and also the costs in the County Court, including the usual counsel fee.

CAMERON, J.A.:—Section 1 of by-law No. 155 of the Rural Municipality of Portage la Prairie contains no direct reference to and does not name any person, landlord or tenant, mortgagor or mortgagee, owner or occupant or trespasser. In the provision that the well shall at all times be kept covered "except when necessarily opened for the purpose of cleaning or repairing said well," the indirect reference is to the person in occupation of the premises where the well is. It would be the occupant or tenant of the premises who would ordinarily use the well and keep it in order. This indirect reference can hardly be extended to include landlords or mortgagees, or owners not in possession.

Section 2 of the by-law does not apply here at all. There was never any notice served on the defendant in this case.

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Section 3 of the by-law, the penalty clause, "that any person violating the provisions of this by-law . . . shall be subject . . . to a penalty," &c., applies to the persons designated in sec. 2. That it has any application at all to section 1, wherein no persons are mentioned, is doubtful. If it does apply, however, to sec. 1, it can only refer to occupants. The judgment of the Court below must be set aside.

HOWELL, C.J.M., concurred.

*Appeal allowed.*

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## MANITOBA.

MARCH 4TH, 1912.

COURT OF APPEAL.

### PEARSON v. O'BRIEN.

### O'BRIEN v. PEARSON.

*Vendor and Purchaser—Contract for Sale of Land—Material Alteration — Place of Payment of Purchase-price — Inoperative Document—Statute of Frauds — Memorandum—Option — Acceptance — Cheque — Letter — New Terms—No Consensus—Subsequent Conduct — Caveat—Removal—Certificate of Title Subject to Caveat—Effect on Claim Made in Caveat—Real Property Act.*

The judgment of MATHERS, C.J.K.B., 18 W. L. R. 563, was affirmed.

A point not taken before MATHERS, C.J.K.B., was raised by the appellant upon the argument of the appeal, viz., that the effect of O'B.'s taking a certificate of title subject to P.'s caveat was, that O'B. thereby admitted the claim set forth in the caveat, and that that claim was no longer controversial, but became an established interest in the land. This point was considered by the Court, and determined against the appellant, upon a consideration of various sections of the Real Property Act.

*Re Moore and Confederation Life Association*, 9 Man. L. R. 453, distinguished.

Appeals by Pearson from the judgment of MATHERS, C.J.K.B., 18 W. L. R. 563, in both actions.

The appeals were heard by HOWELL, C.J.M., RICHARDS, PERDUE, and CAMERON, JJ.A.

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C. P. Wilson, K.C., and W. H. Trueman, for Pearson.

I. Pitblado, K.C., and H. V. Hudson, for Douglas.

J. E. O'Connor and A. G. Kemp, for O'Brien.

RICHARDS, J.A.:—The facts are set out in the judgment of the learned trial Judge, who found that there was no evidence of a completed contract between Douglas and Pearson. I agree fully with the views taken by him, and shall try to not repeat his grounds.

Apparently, before him, the contract relied on was the formal agreement prepared by Douglas's solicitors and sent to Pearson, and which Pearson altered after its execution by Douglas.

Before this Court a strong argument was made that a contract was shewn by the option—I mean by that the informal instrument entered into at Moose Jaw at the end of the first negotiation between Pearson and Douglas. It is said that this was in itself a contract, and that in any event the use of Douglas of the cheque is a ratification of it.

This latter view, I think, is met by the fact that, even if the option and the cheque could together form a contract, they do not refer to each other. Further, they differ in their terms, as pointed out by the learned trial Judge. Also, as pointed out by him, when Douglas banked the cheque, he used it supposing it to be a payment under the formal agreement, and was not aware of the alteration made by Pearson in that agreement.

What seems to me a fatal objection to treating the option as a contract is, that it not only does not say whether the vendor or vendee is to make the further mortgage contemplated by it, but it also does not state any of the terms of that mortgage, or the rate of interest it is to bear. The object of it, patently, was to raise as much cash as possible for Douglas; but the amount of cash which could be raised would be materially influenced by the rate of interest, a larger sum being likely to be advanced in consideration of getting a higher rate of interest. Is it to be assumed that Douglas, in order to increase this amount, could make or insist on the new mortgage bearing 12 per cent or 15 per cent. interest; and what terms of repayment of the principal could Pearson be forced to agree to? If not, where is the certainty as to the terms of the new mortgage?

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I think, too, that the correspondence and acts of the parties shew distinctly that the option was not to be the final contract, but that the only final contract intended was to be the formal agreement.

It is argued that the terms of the agreement were, that the purchase-money was to be payable in Winnipeg, and not in Moose Jaw. There is nothing in the option referring to this, and the fact that Pearson made his cheque for the cash payment of $2,000 payable at par in Moose Jaw seems to me strong evidence that his understanding was that the purchase-money should be payable there.

Pearson relies on the possession taken by him, and on the payment of part of the taxes by him, as part performance to take the case out of the Statute of Frauds. The payment of the taxes is, I think, no part performance. Douglas also was paying a portion of the taxes, and it is evident, I think, that payment of a part by each was meant to be only a temporary arrangement until the rights of the parties could be settled, because they were then at arms' length.

As to the possession, in addition to the fact pointed out by the learned trial Judge, that Pearson did not get this possession with Douglas's privity or consent, it seems to me that, in any event, it was not such a possession as Pearson could rely upon. Possession to be of any value as against the statute, must be in pursuance of a completed agreement, whether verbal or written, and such as could be enforced by the Court if in writing; and I find none such here. Furthermore, I do not see that any injustice would result to Pearson from his taking possession, as he did, if specific performance is not ordered. He merely took the property and collected rents; and it would, therefore, be no fraud upon him to refuse to carry out the contract.

But counsel for Pearson, on the hearing of the appeal, raised a question, apparently not discussed before the learned trial Judge, and which is not taken in the præcipe on appeal, and which was not pleaded in the sense in which the question is now raised. I refer to the argument that the acceptance by O'Brien of the certificate of title, subject to Pearson's caveat, is, by virtue of the Real Property Act, an admission that the contract upon which the caveat was filed is a valid, complete, and binding contract upon O'Brien, and enforceable against him.

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In favour of that argument, the only two points that I can see are: first, the provisions of sec. 132 of the Real Property Act; and, second, the decision of the Court of King's Bench in Re Moore and Confederation Life Association, 9 Man. L. R. 453.

Section 132 says: "So long as any caveat prohibiting the transfer . . . remains in force, the District Registrar shall not registrar any instrument purporting to transfer . . . the land . . . unless such instrument be expressed to be subject to the claim of the caveator."

In Re Moore and Confederation Life Association, the certificate of title was in favour of a woman as "sole surviving executrix and devisee under the will of . . . " subject to certain incumbrances. Certain of these incumbrances had been put on by herself as against her interest as devisee. It was held that the reference to her as "sole surviving executrix and devisee" were words of description, and did not enable her, while holding the certificate in that form, to exercise certain powers under the will by which she could give priority to a transfer by her, as executrix, over the instruments created by herself as devisee. In giving the judgment of the Court, Mr. Justice Killam uses this expression: "Here the District Registrar has found in the registered owner a power inconsistent with two of the incumbrances named, which seems to us wholly opposed to the principles of the Real Property Act, *as that Act makes a certificate of title final at each stage.*"

The italicised words are relied on as a holding sufficiently broad to cover the contention that, in the present case, the taking of the certificate of title, subject to the caveat, is an admission that the agreement on which that caveat was founded was binding on the certificatee, O'Brien.

The purpose of the caveat is to give notice of a claim, but not in any way to validate or better the condition of that claim; and all reasonable purposes of the Act are fulfilled by continuing notice of that claim upon a certificate issued after it is filed. That leaves the caveator in precisely the same position, as against the new certificatee, as he had been in against the old one. An interpretation which would give a caveator, by virtue of the statute, a right which did not previously exist, could only be upheld on the strength of legislation so worded as to have no other meaning; and I



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do not find such legislation in the Real Property Act. The words "unless such instrument be expressed to be subject to the claim of the caveator" seem to me to mean merely such claim, if any, as the caveator had by virtue of that alleged right upon which his caveat was filed, whatever that might be.

Referring to Re Moore and Confederation Life Association, sec. 71 of the Act says that "each certificate of title . . . shall . . . be conclusive evidence at law and in equity . . . that the person named in such certificate is entitled to the land described therein for the estate or interest therein specified."

It is only as in the sense above mentioned that the judgment in Re Moore and Confederation Life Association says that the Act makes a certificate of title final at each stage. The certificate there had issued, as stated above, subject to two incumbrances put on by the certificatee herself; and, if the words "surviving executrix and devisee" were merely descriptive of the certificatee, then the judgment was right in saying that, while the certificate stayed in force, it was final as against her, the certificatee's right to prefer a new party to certain of these incumbrances which she herself had placed upon the property. I cannot see that the words could be in any way stretched so as to uphold the present contention of Mr. Pearson's counsel.

Section 70 says that the land mentioned in any certificate of title shall by implication be deemed to be "subject to" any certificate of lis pendens issued out of any Court of competent jurisdiction in this province, and duly registered since the date of the certificate of title. A lis pendens is notice of a claim, and that action has been taken to enforce an alleged right, just as a caveat is notice of a claim to an alleged right. The words "subject to" are used in sec. 70 as in sec. 132. If the wording of sec. 132 means that the validity of the agreement upon which the caveat is filed is admitted, then I see no reason why it should not equally be held that, under sec. 70, the mere filing of a lis pendens against land, the title to which is under the Act, should, in itself, prove the claim of the plaintiff in the action on which the lis pendens was filed. The answer to this, I assume, would be, that the filing of the lis pendens in no way depends on the volition of the certificatee, while the taking of a new certificate subject to a caveat is an act which does depend

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on the volition of the new certificatee. Though there is that difference, I am unable to see why that construction should be put upon sec. 132 merely because of that act of volition. The words in both sections are "subject to."

It may be a matter of great importance to a purchaser to get his certificate at once. He may have the fullest knowledge that the claim of the caveator is shadowy and unsubstantial, and quite incapable of being enforced. He may have further persons to whom he is willing to sell, who are willing to take it without having the caveat taken off; yet, if the plaintiff's contention is correct, he must wait until he might lose his own sale, while he takes proceedings to get rid of a caveat. It seems to me that, to uphold the contention of the plaintiff, would be to put it in the power of unscrupulous persons to levy blackmail by placing caveats under such circumstances. There is no principle of justice or merit involved in the contention, but rather one of possible great injustice.

I would dismiss the appeals with costs.

PERDUE, J.A.:—These two actions were tried together. The facts involved are fully set forth in the judgment of Mathers, C.J.K.B.

On the 24th May, 1910, the defendant, at Moose Jaw, gave to the plaintiff a written offer to sell the land in question for $9,750, on the terms mentioned in the writing. The document is set forth in full in the judgment from which this appeal is brought. One of the terms was, payment of $2,000 by the 26th May. A further term was, that the defendant was to receive the difference between what could be borrowed upon the property in excess of the existing mortgage as soon as the new mortgage could be completed. These two sums, the $2,000 and the balance of the new loan after paying the existing mortgage, would together make up the amount which the defendant expected to receive in the way of payment down, as distinct from the postponed payments. The remainder of the purchase-money, after deducting the above two sums, was to be paid in three equal annual instalments, with interest at six per cent. per annum.

On the 25th May, the plaintiff, who resides at Winnipeg, wrote the defendant forwarding him a cheque for $2,000, payable at par in Moose Jaw where the defendant resides. There was not in the letter any explicit acceptance of the

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defendant's offer. Written into the body of the cheque were the words: "Being first payment in full on lot 26 & S.½ of lots 23, 25, in 85 St. James, plan 127. price 9,750. payable 2,000 cash, balance of equity in 1-2-3 years @ 6% annually." The terms as set forth in the cheque differ from those in the offer, in that nothing is said as to the amount to be raised by loan. This is a substantial difference, as the terms mentioned in the cheque would give the defendant less in the way of early payment and would increase the amount of the postponed payments. There was not, therefore, an unqualified acceptance of the terms contained in the offer.

Enclosed with his letter of the 25th May, the plaintiff forwarded a formal agreement which had been signed by him and which he requested the defendant to sign. This document contained a number of provisions in addition to or differing from the terms mentioned in the defendant's offer. Two of them are of importance. The purchase-money was, in the first place, made payable, by the terms of this document, to the vendor at Winnipeg. In the next place it provided that upon payment of . . . dollars (the amount being left blank) of the purchase-money, the purchaser might ask for and the vendor should give a deed or transfer of the land, upon the purchaser giving a first mortgage on the land to secure the balance of the purchase-money.

The defendant did not execute this agreement, but his solicitors prepared a new one, containing for the most part terms similar to those contained in the agreement forwarded by the plaintiff. But in the document prepared at the defendant's instance, the purchase-money was made payable at Moose Jaw, Saskatchewan, and the whole provision as to the purchaser obtaining a transfer upon giving a mortgage, was struck out of the printed form. The document also contained a covenant that the plaintiff would indemnify the defendant against liability on the new mortgage to be placed upon the land. This document was executed by the defendant, and sent by his solicitors to the plaintiff. they in their letter calling particular attention to the covenant of indemnity. On receiving this document from the defendant, the plaintiff altered it by inserting in the clause stating the place of payment the words "but" and "at par in Winnipeg." He then executed the document and returned it to the defendant's solicitors, with a letter in which he thus refers to the

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change he had made: "You changed the place of payment from Winnipeg to Moose Jaw, and as the property is here, it is only proper to have the payments payable at par in Winnipeg, which you will see I have changed." This letter was written on the 30th May. On the 2nd June, the defendant's solicitors wrote to the plaintiff saying that he had changed the agreement so that as it stood it was not the contract executed by the defendant. They said the change was not satisfactory to their client, and that he withdrew from the agreement.

It rests upon the plaintiff to shew that there was a concluded agreement between himself and the defendant, and that there was a sufficient memorandum in writing signed by the defendant to satisfy the requirements of the Statute of Frauds. I cannot find from the above correspondence and documents that there was at any time a concluded agreement arrived at between the parties. It has already been shewn that there was no straight acceptance of the offer of the 24th May. Th agreement sent by the plaintiff on the 25th May was altered by the defendant in three respects: (1) as to place of payment; (2) by striking out the clause as to giving a transfer and accepting a mortgage; (3) by inserting a covenant for indemnity. This agreement was, in turn, altered by the plaintiff, after it had been signed by the defendant, by inserting a provision which, although it left Moose Jaw as the place of payment, made the money payable at par in Winnipeg. This would throw upon the defendant the expense of transmitting the money from Winnipeg and paying it at Moose Jaw. It is argued that this was not a material alteration. I do not think that effect can be given to such a contention. The place of payment is a material matter in a contract: Burchfield v. Moore, 3 E. & B. 683. The defendant insisted upon making Moose Jaw the place where payment should be made. The plaintiff, while agreeing to this, interpolated in the contract a new or added condition that would impose upon the defendant the expense of the transmission and payment of the money. This would clearly affect the defendant adversely, and was a material alteration. This addition to the document, made after it had been signed by the defendant and without his consent, avoided it as against him: Master v. Miller, 4 T. R. 320; Leake on Contracts, 6th ed., p. 589. If the agreement had been silent as to the place of payment,

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the law would presume that the money should be paid at Moose Jaw, where the defendant resided and where the offer was made: Fessard v. Mugnier, 34 L. J. C. P. 126; Robey v. Snaefell Mining Co., 20 Q. B. D. 152. But, in any event, the defendant imposed the condition that the money should be paid to him at Moose Jaw.

The fact that the defendant cashed the cheque cannot assist the plaintiff. It was cashed before the defendant knew of the alteration made by the plaintiff in the agreement, and in the belief that the form of contract executed by the defendant would be accepted by the plaintiff. After the negotiations fell through, the defendant offered to return the money, and he repeats this offer in his pleading.

The plaintiff's own evidence shews that the whole terms of the alleged purchase were not settled at the interview with the defendant at Moose Jaw, when the written offer or option of the 24th May was given. The plaintiff admits that certain terms were left indefinite. He does not clearly state whether he or the defendant should execute the new mortgage. He says he was to get an agreement of sale when O'Brien's caveat should be discharged. While admitting that the terms were left indefinite on the 24th May, he relies upon the subsequent settlement of the terms set out in the formal agreements. It is clear that neither of these formal agreements was definitely accepted by both of the parties before the defendant declared the negotiations off. Looking at all the writings that passed between the parties, it does not appear that at any point there was a concluded contract between the parties expressed in these writings. All the documents must be taken into consideration in finding such a contract. The plaintiff cannot select some of the writings and say that these sufficiently evidence a contract, regardless of the fact that there were other important conditions of the intended contract which were not embraced in the writings and were still unsettled: Hussey v. Horne-Payne, 4 App. Cas. 311, 323; Bristol, &c., Co. v. Maggs, 44 Ch. D. 616; Stow v. Currie, 21 O. L. R. 486; Queen's College v. Jayne, 10 O. L. R. 319; Bohan v. Galbraith, 13 O. L. R. 301, 15 O. L. R. 37.

I agree with the learned trial Judge's finding as to the effect of the plaintiff's possession of the premises and the payment by the plaintiff of a portion of the taxes. The plaintiff was not put in possession by the defendant, and

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the latter was not aware that such possession had been taken until after he had declared the contract off. Taking possession, if relied on as a part performance, must be taken with the knowledge of the person to be charged: Fry, Specific Performance, 5th ed., pars. 587, 588. Besides, there was no concluded contract of which there could be part performance: Fry, par. 597.

Mr. Wilson advanced a new point upon the argument before this Court, one which had not been taken before the trial Judge or raised in the præcipe. O'Brien, who is a defendant in the suit brought by Pearson and is plaintiff in the suit brought to set aside Pearson's caveat, had taken a transfer from Douglas, subject to Pearson's caveat, and had obtained a certificate of title subject to the last-mentioned caveat. Mr. Wilson contended that the effect of O'Brien's taking a certificate of title subject to Pearson's caveat was, that O'Brien thereby admitted the claim set forth in the caveat, and that such claim was no longer controversial, but became an established interest in the land. The effect of this startling proposition would be, that a mere lis or disputed claim would, if it formed the subject of a caveat filed against the land, become, as against a transferee who took his certificate of title subject to the caveat, an actual and indisputable interest in or charge upon the land. The point was argued very fully by counsel upon both sides, and it becomes necessary to consider it at some length.

The Real Property Act, R. S. M. ch. 148, in secs. 127-145, treats of caveats, their effect, and the procedure to be followed in dealing with them. Sections 127-129 relate to caveats filed where an application is pending to bring the land under the operation of the Real Property Act, and before a certificate of title has been issued to any person. In such cases, the District Registrar shall not bring the land under the new system until all caveats shall have been disposed of: sec. 128. Where a caveat is filed forbidding the bringing of the land under the Act, it operates as an injunction against the issue of a certificate of title to the person applying to be registered as owner of the land.

Sections 130-132 deal with caveats filed after the land has been brought under the new system.

Section 130 is as follows: "130. Any person claiming an estate or interest in land, mortgage or incumbrance under the new system, may file or cause to be filed on his

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behalf with the District Registrar a caveat in the form in schedule H to this Act, forbidding the registration of any person as transferee or owner of or of any instrument affecting such estate or interest, or unless such instrument be expressed to be subject to the claim of the caveator."

Section 131 declares that such caveat shall be deemed to have lapsed upon the expiration of fourteen days after notice given to the caveator to take proceedings in Court on his caveat, unless certain procedure is followed and certain things are done as provided by the section.

Section 132 is as follows: "132. So long as any caveat prohibiting the transfer or other dealing with any land, mortgage or incumbrance remains in force, the District Registrar shall not register any instrument purporting to transfer, mortgage or incumber the land, mortgage or incumbrance in respect to which such caveat is lodged, unless such instrument be expressed to be subject to the claim of the caveator."

It is to be observed that sec. 130 enables the caveator (1) to forbid the registration of any person as transferee or owner of the estate or interest claimed by the caveator, or (2) he may forbid the registration of any instrument affecting such estate or interest, or (3) he may forbid the registration unless the instrument is expressed to be subject to the claim of the caveator. Whichever of these modes of procedure the caveator adopts, the District Registrar is prohibited from registering any instrument purporting to transfer, mortgage or incumber the land, &c., in respect of which the caveat is lodged, unless such instrument is expressed to be subject to the claim of the caveator: sec. 132.

The form of caveat provided by the Act, schedule H, and referred to in sec. 130, is not altogether appropriate to the several things permitted by the section; but this is not very material, in view of the effect which is given by sec. 132 to all caveats filed after the land is brought under the Act. By that section, if a caveat has been filed after the land has been brought under the Act, even if the caveat absolutely forbids the transfer or other dealing with the land, &c., the District Registrar is prohibited from registering an instrument purporting to deal with it "unless such instrument be expressed to be subject to the claim of the caveator." The intention of this would seem plainly to be,

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that a transfer or other dealing with the land may be put through by the District Registrar, subject to any existing caveat filed after the first certificate of title has been issued, and that in such case the transferee would take his rights subject to the claim set out in the caveat, whatever that claim might be, so that the right of the caveator might be preserved and remain as valid against the transferee as it was against the transferor, but that no additional force should be given to such claim by making the new certificate of title subject to it.

Mr. Wilson argued that the form of the certificate of title given in schedule A to the Act, which declares that the title mentioned in the certificate is "subject to such incumbrances, liens and interests as are notified by memorandum underwritten (or indorsed hereon)," makes no mention of "claims," and that anything underwritten or indorsed upon the certificate must be taken to be an actual, established interest. I think it is clear that the word "interests" includes interests that are merely claimed as well as those that are established or admitted.

Section 70 makes the land in the certificate subject, by implication, to caveats affecting the land registered since the date of the certificate of title, sub-sec. (j). If, in such a case, the registered owner transfers to a third party, subject to the caveat, who takes a new certificate, subject to the caveat, the caveator's position is not altered, he has the same rights against the transferee that he had against the transferor, but it would be unreasonable to expect that he should have more. That the Act intended to do more than preserve his rights in case of a dealing with the land cannot be gathered from its provisions.

Section 145 provides that "any person claiming any estate or interest in land, mortgage or incumbrance subject to or under the new system, may, in lieu of or after filing a caveat, proceed by way of statement of claim, and may file with the District Registrar a certificate of lis pendens or other proper evidence of such proceedings." It will be seen that this provision extends to all persons referred to in sec. 130, and applies not only to lands, &c., under the new system, but also to lands, &c., "subject to" the new system. The words "subject to" refer to lands in respect of which an application to bring them under the Act has been made, but in respect of which a certificate of title has

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not yet been issued. Such lands, covered by a pending application, are, by sec. 34, declared to be "subject to the new system," and no registration under the old system affects them until the application is withdrawn or rejected. Section 145, therefore, permits the bringing of a suit and the filing of a certificate of lis pendens, in lieu of a caveat, whether before or after the issue of a certificate of title. This clearly shews that the filing of a caveat has no greater effect, in so far as the rights or interests of the caveator in the land are concerned, than if the same person had proceeded by statement of claim and had filed a certificate of lis pendens.

Mr. Wilson based his argument upon this branch of the appeal largely upon some expressions that occur in the judgment of the Court of King's Bench in Re Moore and Confederation Life Association, 9 Man. L. R. 453. In that case a certificate of title had been issued to Emma Moore, sole surviving executrix and devisee under the will of William Beall, deceased, subject to certain incumbrances, consisting of a mortgage made by the testator, a charge of a legacy under his will to his daughter, a mortgage made by Emma Beall upon her own interest as devisee only, and a writ of fi. fa. lands against Emma Beall's interest as devisee only. Emma Moore was the widow of the testator, and, after the death of her husband, had married one Moore. She was the same person as Emma Beall. The executrix attempted to sell the property for the purpose of paying debts and legacies, under power conferred on her by the will, and thus to cut out the two latter of the incumbrances. It was held that the certificate of title did not shew that she possessed a power inconsistent with her right as devisee or enabling her to override these incumbrances. The whole point in that case was, that a certificate issued to E. M., "sole surviving executrix and devisee under the will," &c., did not shew that she had powers enabling her to nullify incumbrances against her as devisee. The words "sole surviving executrix," &c., were taken as mere description, and not as shewing that the certificate of title had been issued to her in her capacity of executrix and with the powers given her by the will. If the certificate had been issued to E. M. as executrix, and the will had been sufficiently embodied in the certificate, the difficulty that arose in the case would have been obviated. I am informed by the

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District Registrar that the certificate was afterwards amended by him, and the will was spread upon its face. This overcame the difficulty. Section 69 of the present Act prevents any such question from arising in the future. Much was sought to be made of an expression used by Killam, J., in delivering the judgment of the Court, that the Act makes a certificate of title final at each stage. That is true to this extent, that every certificate of title has the conclusive effect given to it by the Act: secs. 71, 77. The want of finality in the certificate in Re Moore and Confederation Life Association was, that a person apparently registered as owner in one right sought to exercise powers in another right. The certificate is conclusive evidence that the person named in the certificate is entitled to the land for the estate or interest therein specified, subject to the right of any person to shew that the land is subject to any of the exceptions or reservations mentioned in secs. 70 and 74, or to shew fraud: sec. 71. This fraud must be one wherein "the registered owner, mortgagee or incumbrancer (sic) has participated or colluded," and must be shewn "as against such registered owner, mortgagee or incumbrancer." The meaning of this seems to be, that a certificate of title may be set aside for fraud in the registered owner in obtaining it, and that his mortgagee or incumbrancee may also be attacked if such mortgagee or incumbrancee has participated in the fraud: compare sec. 76, sub-sec. (c). The mortgagee or incumbrancee has only a security upon the land; he has no estate or interest in it: sec. 100. The estate or interest referred to in sec. 71, of which the certificate of title is made conclusive evidence, is only the estate or interest of the registered owner specified in the certificate. It may be shewn that a registered mortgage has been paid off, that a judgment appearing on the certificate of title has been satisfied, or that the judgment debtor is not in fact the same person as the registered owner, or that a caveat should be removed, although the instrument in each of these cases has been entered upon the certificate of title.

I think that when O'Brien took a transfer and certificate of title, both subject to the caveat filed by Pearson, the rights of the latter, if any, as against the land, were in no wise diminished or improved. When the new certificate of title was issued, with his caveat indorsed upon it, Pearson's rights or interests in the land, whatever they might be.

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were left exactly as they were before the transfer, so that he might proceed to enforce his interest against the land in O'Brien's hands, in the same manner as if Douglas were still the registered owner.

I think the appeals in both suits should be dismissed with costs.

CAMERON, J.A.:—The certificate of title to the lands in question, No. 160860, in the name of Thomas Richard O'Brien, is expressed to be subject to such incumbrances, liens. and interests as are notified by memorandum underwritten or indorsed thereon, viz., a mortgage to Thomas Fish for $3,000 and two caveats, one registered on the 21st May, 1910, by Thomas Richard O'Brien, and the other registered on the 31st May, 1910, by George Anthony Pearson.

In the case of an application to bring lands under the Real Property Act, any person claiming an estate or interest therein may file a caveat forbidding such being done, and the District Registrar shall not bring the lands under the new system until such caveat shall have been disposed of (secs. 127 and 128). Such caveat shall, however, lapse unless steps are taken within one month to establish the right set out in the caveat (sec. 129).

In the case of lands under the new system, any person claiming an estate or interest therein may file a caveat forbidding the registration of any person as transferee or owner, or of any instrument affecting such estate or interest, or unless such instrument be expressed to be subject to the claim of the caveator (sec. 130). By sec. 131, provision is made for notice to the caveator to take proceedings on his caveat and for the determination of the caveat on default of proceedings, or, in the event of the caveator appearing, then for such order by the Court as may be directed. And by sec. 132 it is provided that, so long as the caveat remains in force, the District Registrar shall not register any instrument purporting to transfer, mortgage. or incumber the land, "unless such instrument be expressed to be subject to the claim of the caveator."

It is contended on behalf of Pearson that the transfer of the lands in question from Douglas to O'Brien and the certificate of title thereto in the name of O'Brien, being expressly subject to the caveat of Pearson, O'Brien cannot

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now dispute the validity of Pearson's claim. It is argued that, the caveat having been filed, it was open to O'Brien to adopt one of two courses. In the first place, he could have decided to contest the claim set forth in the caveat, and take proceedings for its removal under sec. 131, and other provisions of the Act. Or, on the other hand, he could accept the transfer and the certificate subject to Pearson's claim set out in his caveat. The former course he did not follow. The latter he deliberately adopted, so that he is now, by his own acts, precluded from contesting Pearson's claim.

In this view, each certificate forms a fresh root of title, and its terms are absolute. The policy of the Act is, that all caveats should be disposed of at the time of the issue of the certificate. If the land be not already under the Act, the certificate cannot be issued until the caveat is out of the way. If the land be under the Act, then either the caveat must be disposed of or the certificate issued recognising the claim set forth in the caveat. The policy of the Act provides for registration of title and not of instruments, and intends that conflicting claims shall be disposed of on the granting of each successive certificate, either by being put an end to or by being recognised as valid.

Under the provisions of our Real Property Act, as originally passed in 1885, any person claiming to be interested in any land might lodge a caveat "to the effect that no disposition of such land be made either absolutely or in such manner and to such extent only as in such caveat may be expressed, or until notice shall have been served on the caveator, or unless the instrument of disposition be expressed to be subject to the claim of the caveator, as may be required in such caveat, or to any lawful conditions expressed therein:" sec. 107. And, by sub-sec. (3) thereof: "So long as any caveat remains in force prohibiting the transfer or other dealing with any land, the Registrar-General shall not enter in the register book any memorandum of transfer or other instrument purporting to transfer or otherwise deal with or affect the land in respect to which such caveat is lodged." There was thus no distinction drawn in the original Act between the caveats filed before and after lands were brought under the system. In both cases the prohibition was absolute, and the lands could not be dealt with by the Registrar until the caveat had been disposed of.

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Evidently objections were found to these provisions, as the sections were repealed in 1887, ch. 11, 50 Vict., and certain sections substituted therefor, and the substituted sections were amended in 1888, ch. 22, sec. 13, by adding, " unless such instrument be expressed to be subject to the claim of the caveator as may be required in such caveat," to sub-sec. 9 of sec. 107 of ch. 11; and the sections as then substituted and as so amended are to be found substantially in the consolidating Act of 1889, ch. 16, 52 Vict., sec. 130, where the distinction, now existing, between the effect of caveats filed in respect of lands to be brought under, and the effect of caveats in respect of lands already under, the new system, appears. In the former case, the Registrar was absolutely prohibited from bringing the lands under the new system until and unless the caveat had been disposed of. These provisions are now to be found in secs. 127, 128, and 129 of the present Act. In the other case, where the lands are already subject to the new system, the provisions made in the Act of 1886 and in the consolidating Act of 1887 were, in substance, the same as those now to be found in secs. 130, 131, and 132 of the present Act.

Since the amendment in 1888 above referred to, it has been the practice to accept transfers and issue and accept certificates subject to the claims set out in caveats therein referred to, without any idea being entertained that the transferees or holders were thereby recognising as valid the claims alleged in such caveats. By the legislation expressed in the amendment of 1888, the policy of the law was assumed to be, that, in the case of lands under the new system, caveats might be filed for the purpose of giving notice of claims the merits of which should be thereafter investigated and decided, and that, until they were so disposed of, certificates and instruments might be issued subject to such investigation and ultimate decision. Until now it has not been contended that the acceptance of an instrument under the Act, expressed to be subject to a claim on a caveat, placed the caveator in any stronger or better position than he was before its issue.

It was held by the Court en banc in Alexander v. Gesman, 4 Sask. L. R. 111, that a caveat under the Land Titles Act of Saskatchewan was "more than a notice." But the decision in that case does not go to the extent we are asked to go here.

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"A caveat is not to be regarded as notice to all the world —actual registration is notice to all the world—but only as a means of conveying notice and as a statutory injunction against dealing with the property:" Hogg, Australian Torrens System, p. 886. "A caveat is worthless unless there is in existence, at the time of its entry on the register, an enforceable right of some kind relating to the land:" ib., p. 1040. The lodging of a caveat against registration of any transfer of land under the Act only throws a cloud upon the title of the registered proprietor, which it is the duty of the vendor, as between himself and a purchaser, to have removed: Taylor v. Land Mortgage Bank, 12 Vict. L. R. 748,

According to the Victorian statute, sec. 144, Hogg, p. 543, a caveat may forbid the registration of any person as transferee or any instrument, either absolutely or until after notice to the caveator, "or unless such instrument be expressed to be subject to the claim of the caveator as may be required in such caveat." And, by sec. 146: "So long as any caveat shall remain in force prohibiting any registration or dealing, the Registrar shall not enter in the register book any change in the proprietorship of or any transfer or other instrument purporting to transfer or otherwise deal with or affect the estate or interest in respect to which such caveat may be lodged." The provisions of the Western Australian Act are similar: ib., 632, 633. In the other Australian colonies there does not appear to be provision for the issue of certificates or instruments subject to the claim set out in a caveat.

So far as I can gather from Mr. Hogg's work, no case has arisen under the statutes of Victoria regarding the effect of the issue of a certificate subject to a caveat. In the other jurisdictions the case could not arise at all, as the Registrar is absolutely prohibited from dealing with the title so long as the caveat remains in force, as was our law under the original Act of 1885, until amended in 1888.

In the case of Taylor v. Land Mortgage Bank, supra, the action was brought by a purchaser against the holders of certificates of title to lands against which a caveat had been lodged, and the real question there was to determine whose duty it was to have the caveat removed, and it was held that the existence of the caveat was not such evidence as to want of title as to warrant the refusing of relief.

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The term "caution" is used in the Land Transfer Act, 1875, secs. 53-59. "A caution is a mere temporary suspension of the right of the proprietor to deal with the property registered in his name, and has no other direct effect—either in the nature of the interest put forward by the cautioner or in restricting the property rights of the proprietor:" Hogg, Ownership and Incumbrance, p. 231.

We were pressed with the judgment of the late Chief Justice Killam in Re Moore and Confederation Life Association, 9 Man. L. R. 452. There it was held that the District Registrar had found in the registered owner a power inconsistent with two of the incumbrances named in the certificate. It was not shewn that Mrs. Moore had, as executrix, any power inconsistent with her interest as devisee so as to make the proposed transfer override the incumbrances against her as devisee. The term "executrix" is descriptive and does not shew her power. Had the will been set out in the certificate, there would apparently have been no question. But the statement of the Court that the Act makes the certificate of title final at each stage must, it seems to me, be construed with the whole statute in view. And here we have a provision of the Act permitting the issue of a certificate subject to whatever claims may be set forth in a caveat. In my opinion, it would be going too far to say that the policy of finality of a certificate demands that we must read those words as converting a doubtful and perhaps worthless claim into one which the registered owner is not at liberty to question.

I have given the best consideration I am able to the wording of sec. 132. The contention practically is, that this section should be construed as if the concluding words read "unless such instrument be and be expressed to be subject to the claims of the caveator, whether that claim is capable of being established or not." Surely, had that been the intention of the legislature, care would have been taken to give it clearer expression in words. If, on the other hand, the intention of the legislature was to facilitate the registration of instruments and the issue of certificates, and at the same time to make provision for the preservation of the rights and interests of parties who may have claims against the lands by virtue of unregistered instruments or otherwise, until such claims shall be ultimately disposed of, then, it seems to me, the language used is apt and clear, and it

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appears to me that the legislature had no other object in view. The word "expressed," as used in both sections, 130 and 132, and in reference to this discussion, is a significant term. The caveator has no objection to registration, provided it is "expressed" to be subject to his claim set out in the caveat, that is, provided that it is made absolutely clear to all parties interested in the title to the lands that the registration does not affect his claim, which, thereafter as before, he remains at liberty to establish or defend according to the nature of the proceedings which may be taken.

Upon consideration, I am of opinion that the provisions of the Act in question are not open to the restricted construction for which counsel contends, and that O'Brien's position has not been altered or affected by the memoranda on the transfer and certificate.

Was there in this case an agreement actually concluded between Pearson and Douglas? If there was no completed contract, then Pearson must fail. Obviously, if there is no concluded contract, if there have been negotiations never crystallised into a contract, then there can be no evidence of a contract within the Statute of Frauds. It was on this ground that Hussey v. Horne-Payne, 4 App. Cas. 311, was decided in the House of Lords. Lord Cairns examined the whole correspondence to find if it evidenced a complete contract, and found that, although two of the letters, taken by themselves and separately from the others, might lead the reader to think they amounted to a concluded agreement, yet "there was in point of fact no completed agreement between the parties:" p. 321. Mr. Justice Kay in Bristol, etc., Co. v. Maggs, 44 Ch. D. at p. 623, sets forth his understanding of the decision in Hussey v. Horne-Payne: "Both he (Lord Cairns) and Lord Selborne seem to me to lay down broadly that, where it is sought to make out a binding contract from correspondence, the whole of it, as well as the verbal communications at interviews, should be regarded, and it is not right to stop at one letter of the correspondence, which, with what preceded, might constitute a sufficient agreement within the Statute of Frauds; whereas if the whole of the correspondence were considered . . . it may clearly appear that those letters were in truth only part of an uncompleted negotiation." "The question is really one of fact:" per North, J., in Bellamy v. Debenham, 45 Ch. D. 494.



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Pearson did not agree to the formal document submitted to him for execution by Douglas, but made an alteration in it. Douglas thereupon withdrew from the negotiations, as he had a right to do, and there was, to my mind, no contract. The minds of the parties had not in point of fact met.

The position of the parties seems to be this: A. offers to sell B. certain property for $10,000; one-half cash, balance in one year. B. accepts in writing, saying: "I will pay one-half cash and the balance in one year by paying you $4,975." In reality it is not an acceptance of an offer, but a counter offer, and therefore tantamount to a refusal.

I concur in the judgment of the Chief Justice of the King's Bench, and think the appeals must be dismissed.

HOWELL, C.J.M., concurred.

*Appeals dismissed.*

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## MANITOBA.

MARCH 5TH, 1912.

COURT OF APPEAL.

## FRASER v. CANADIAN PACIFIC R. W. CO.

*Chose in Action—Assignment—Railway Construction Contract—Assignment of Moneys Payable under — Assignment to Sub-contractor without Consent—Assignment to Bank—Notice — Priorities — Novation — Effect of Subsequent Notice.*

The judgment of MATHERS, C.J.K.B., 19 W. L. R. 369, affirmed.

Appeal by the plaintiff from the judgment of MATHERS, C.J.K.B., 19 W. L. R. 369, in so far as it was in favour of the defendants the Imperial Bank of Canada.

The appeal was heard by HOWELL, C.J.M., RICHARDS, PERDUE, and CAMERON, JJ.A.

M. G. Macneill and W. L. McLaws, for the plaintiff.

C. P. Fullerton, K.C., and J. P. Foley, for the defendants the Imperial Bank of Canada.

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The judgment of the Court was delivered by

HOWELL, C.J.M.:—The plaintiff's case is, that he obtained an equitable assignment of the chose in action which was created by the agreement made between the Canadian Pacific Railway Company and the deceased Garson.

The bargain or arrangement made between the deceased and the plaintiff was verbal, and the only witness as to the terms of that bargain is the plaintiff. His evidence is conflicting and unsatisfactory.

It seems certain, however, that the deceased Garson was to receive the money from the company and was to pay the plaintiff. Counsel for the plaintiff asserts, and there seems to be evidence to support it, that this agreement was reduced to writing; but the writing was not produced, and we are in the dangerous position of hearing parol evidence to prove the terms of a written contract, where the loss is only vaguely accounted for.

I think it would be unsafe from the evidence to find as a fact that there was an equitable assignment of this chose in action. For all that appears in the evidence, the bargain might have been (and indeed it seems to me to have been) that the plaintiff was to do the work for the deceased for the same sum which the latter had contracted for, and that he would be paid for the same from time to time as the deceased received the money therefor from the company. This would not be an assignment of the chose in action.

The appeal is dismissed with costs.

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## MANITOBA.

ROBSON, J. MARCH 5TH, 1912.

CHAMBERS.

## MESSERVEY v. SIMPSON.

*Pleading—Statement of Claim—Slander — Joint Charge against three Defendants—Embarrassment — Misjoinder of Parties.*

In an action for false imprisonment and slander, the defendants, two members of a firm and an incorporated company, were, by certain paragraphs of the statement of claim, jointly charged with slander of the plaintiff:—

*Held*, that these paragraphs were embarrassing, and were properly struck out.

Order of the Referee in Chambers affirmed.

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Appeal by the plaintiff from an order of the Referee in Chambers striking out portions of the statement of claim.

N. F. Hagel, K.C., for the plaintiff.
H. Phillipps, for the defendants.

ROBSON, J.:—The action is for damages for certain alleged torts. The defendants are the two members of the partnership firm of Simpson & Nelles, and the Thiel Detective Service Company Limited.

The statement of claim alleges that for a period prior to the 7th December, 1911, the plaintiff had been employed by Simpson & Nelles as a driver, which employment ceased on that date.

The plaintiff seeks damages for false imprisonment and slander. He makes the charge against the three defendants jointly.

The matters now particularly in question are the charges contained in paragraphs 4, 5, 6, and 7 of the statement of claim, wherein it is alleged that the defendants falsely and maliciously spoke and published defamatory words concerning the plaintiff, imputing theft from the defendants Simpson & Nelles. This charge is made jointly against the two members of a partnership and an incorporated company. Under the old procedure, this was such a misjoinder as to have defeated the action. See Carrier v. Garrant, 23 C. P. 276. See also Odgers on Libel and Slander, 5th ed., at the foot of p. 601.

In brief, I would say that it is my view that these clauses 4, 5, 6, and 7 are embarrassing, and that any defendant is entitled to have them struck out under Rule 326.

The same remark applies to the words struck out of paragraph 8.

The appeal should be dismissed with costs as in the Referee's order.

Time for amendment will be extended, if desired.

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## MANITOBA.

ROBSON, J. MARCH 5TH, 1912.

CHAMBERS.

# RE PHILLIPPS AND WHITLA, SOLICITORS.

## RE McGIBBON.

*Solicitors—Bill of Costs—Lump Charge for Services—Fee on Settlement of Litigation—Commission or Percentage on Money Value of Property Recovered by Settlement—Absence of Agreement with Client — Legal Profession Act, sec. 65—Application of Tariff for Litigious Business—Itemised Bill.*

The solicitors rendered to the client important services in litigation and negotiation, and effected, on the client's behalf, a settlement by which the client benefitted pecuniarily to the extent of about $150,000. The solicitors rendered a bill for their services, which, apart from disbursements not questioned, consisted of the single item, "Fee on settlement, $9,500." The Taxing Officer, upon taxation of the bill, allowed $7,976.44, being 5 per cent. on the amount by which the client had been benefitted by the settlement:—

*Held*, on appeal, that, there being no contract between the solicitors and their client for a percentage under sec. 65 of the Legal Profession Act, the tariff promulgated under Rule 986 of the Queen's Bench Act (Rule 990 of the King's Bench Act) provided the only measure of the solicitors' remuneration for litigious business; and the Taxing Officer was not justified in fixing a fee for settlement under the tariff on any basis that would have the result of allowing solicitors, in charging clients, to ignore the tariff and seek remuneration by commission or percentage without any previous agreement with their client to that effect.

*Held*, also, that the solicitors' efforts in procuring the settlement could not be treated independently of the tariff and as work not therein provided for; the proper course was for the solicitors to deliver an itemised bill and for the Taxing Officer to allow a fee in respect of the settlement under clause 1 of the memorandum on p. 10 of the tariff: "When it is proved that proceedings have been taken by solicitors out of Court to expedite proceedings, save costs, or compromise actions, an allowance to be made therefor, in the discretion of the Taxing Officer."

While in certain cases a percentage measure, varying according to circumstances, may fairly be applied to the sale of property or the receiving and investing or otherwise disbursing moneys, it does not follow that solicitors' efforts in litigation should be rewarded upon any such rule.

*Re Johnston*, 3 O. L. R. 1, and cases therein cited, considered.

Appeal by the client from the report or certificate of a Taxing Officer upon a reference to him of a solicitors' bill for taxation.

G. W. Jameson, for the client.

A. B. Hudson, for the solicitors.



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ROBSON, J.:—McGibbon set up a cause of action against persons in Winnipeg for the return of certain property alleged to have been sold by his agents, under circumstances which, he alleged, entitled him to repudiate the transaction. He employed the solicitors, who instituted proceedings; negotiations followed, and as a result the property was re-transferred. McGibbon gained the advantage of a title under the Real Property Act obtained meanwhile. He had had the use of the consideration paid him, a large sum, for a considerable period, free of charge. The commission charged by the agents was refunded. Each party paid his own costs of the litigation. The property could command a higher price than that obtained by the agents. The sale was made at $155,000. As to the increase in market-price, it is sufficient to say that the client, during the negotiations, asserted that the property was worth $308,000. There can be no question that the solicitors exercised skill and diligence, in fact pertinacity, in their employment, and that their efforts brought about advantageous results for their client. The action did not proceed beyond the pleadings and an order for production of documents. The burden of the solicitors' labours were in connection with the settlement. The carrying out of the settlement included work in connection with a large loan to the client, which was necessary to procure the money to refund the consideration he had received on the impeached transaction. There was no arrangement between the solicitors and client for any special rate of remuneration.

The solicitors rendered the bill now in question. Apart from disbursements, which are not in question, it consists of one single item, "Fee on settlement, $9,500." The Taxing Officer considered that the case was one in which he should allow a lump sum, and he fixed $7,976.44, being 5 per cent. on his calculation of the difference between the $155,000 and the value asserted by the client, some fractional frontage probably accounting for the odd figure.

The Taxing Officer, in proceeding on a commission basis, thought In re Richardson, 3 Ch. Ch. 144, an authority for that course. There the solicitor was acting under a power of attorney in selling lands for the client and collecting and remitting moneys; an employment of quite a different nature, the method of remuneration for which forms no criterion here.

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I take it to be clear that, unless there is a contract between a solicitor and his client for a percentage under sec. 65 of the Legal Profession Act, the tariff promulgated under the Queen's Bench Act Rule 986 (King's Bench Act Rule 990) provides the only measure of a solicitor's remuneration for litigious business.

In his memorandum, the Taxing Officer says that the solicitors forgo their fees for work done in the suit and charge only for the settlement. From the evidence, I would think it had been intended that the suit work was being covered by the bulk item charged. If that were the case, there should have been an itemised bill.

Assuming, however, that the item was allowed solely in regard to the settlement, and that the usual tariff items for instructions, pleadings, etc., are being abandoned, the question arises, was the Taxing Officer correct in arriving at a fee on settlement on the basis mentioned? As far as the tariff goes, the only possible authority for this would be the memorandum on p. 10, which says: "1. When it is proved that proceedings have been taken by solicitors out of Court to expedite proceedings, save costs, or compromise actions, an allowance to be made therefor, in the discretion of the Taxing Officer."

Of course, if the Taxing Officer, on a right principle, exercised his discretion under the words quoted, it would not be lightly interfered with, if at all. But what was the principle here? That a solicitor should receive remuneration "in the way of commission or percentage on the amount recoveredered or defended or on the value of the property about which (the) action, suit, or transaction is concerned." This language is from sec. 65 of the Law Society Act. And that section provides that there may be a contract for such a basis of remuneration. Is not that provision an enabling one, without which such a basis could not be adopted, and therefore limited to the case for which it provides, i.e., a contract between the parties to that effect? Section 65 is, of course, valid: Thomson v. Wishart, 19 Man. L. R. 340; but it is an innovation upon the common law and is not to be carried beyond its strict terms. If the result be otherwise, solicitors, in charging clients, may ignore the tariff and seek remuneration by commission or percentage without any previous agreement with their client to that effect.

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I cannot hold that the Taxing Officer was justified in fixing a fee on settlement under the tariff on any basis that would have that result.

It is further contended that the solicitors' efforts in procuring the settlement should be treated independently of the tariff and as work not therein provided for.

I do not agree with this. I think the proper course here is, that the solicitors deliver an itemised bill, and that the Taxing Officer allow a fee in respect of the settlement under the clause quoted from the tariff.

Counsel for the solicitors cited in support of his contention authorities for the allowance, in certain circumstances, of remuneration by way of commission.

One of these cases was In re Attorneys, 26 C. P. 495, where the attorneys had been engaged in non-contentious business which involved their receiving and disbursing from time to time large sums of money. They were allowed for their care and responsibility a commission of one-eighth of one per cent. This case was referred to in Re Johnston, 3 O. L. R. 1. There the solicitor had succeeded in collecting upwards of $70,000 for his client on disputed insurance policies, and had satisfactorily settled the claim of a third party to the moneys. The Court held that he was entitled to receive a quantum meruit for these services, and the $3,200 which had been allowed by the Taxing Officer was not interfered with. It does not appear that this was a percentage allowance. Boyd, C., held that, having regard to the exceptional circumstances, a liberal allowance was justified. He mentioned the line of practice which followed Re Richardson, supra, as manifested in Re Attorneys, supra. It seems to me that, while in certain cases a percentage measure, varying according to circumstances, may fairly be applied to the sale of property or the receiving and investing or otherwise disbursing moneys, as was done in those cases, it does not follow that solicitors' efforts in litigation should be rewarded upon any such rule.

While it is apparent that the solicitors are entitled to substantial remuneration, I do not consider that the measure applied was authorised; and the bill must be referred back. The solicitors will have liberty to deliver an amended itemised bill. The Taxing Officer will allow to the client his costs of this appeal.

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## MANITOBA.

ROBSON, J. MARCH 5TH, 1912.

CHAMBERS.

# RE ST. VITAL MUNICIPAL ELECTION.

## TOD v. MAGER.

*Municipal Election — Candidate Rejected by Returning Officer without Authority — Declaration of Election of Opposing Candidate—Method of Questioning Election—Quo Warranto—Petition—Municipal Act, secs. 217, 218.*

Upon an application for leave to file an information in the nature of a *quo warranto* calling upon the respondent to shew by what authority he held office as Reeve of a municipality, it appeared that the applicant and respondent were both nominated for the office, and that the Returning Officer declared the applicant disqualified, and (there being no other candidate) declared the respondent elected:—

*Semble*, following *Pritchard* v. *Mayor of Bangor*, 13 App. Cas. 241, 250, 253, that the Returning Officer so acted without authority.

And *held*, that the remedy by *quo warranto* was open to the applicant, the cause for which the election was questioned not coming under secs. 217 and 218 of the Municipal Act, which confine the remedy, in certain specified cases, to an election petition.

Clause (c) of sec. 217 applies to cases where there has actually been a vote.

*The Queen* v. *Morton*, [1892] 1 Q. B. 39, 41, and *The Queen* v. *Beer*, [1902] 2 K. B. 698, considered.

Application by Tod for leave to file an information in the nature of a quo warranto calling upon the respondent, Mager, to shew by what authority he held office as Reeve of the Municipality of St. Vital.

H. M. Hannesson, for the applicant.

H. Phillipps, for the respondent.

ROBSON, J.:—From the material adduced it appears that the applicant is a qualified elector of the municipality.

The applicant and respondent were candidates for election as Reeve of the Municipality for the present year. They were both duly nominated on the 5th December last. The voting would have taken place on the 19th day of that month.

After the nomination, objection was taken before the Returning Officer that the applicant, being a Noxious Weed

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Inspector of the Municipality, was a paid officer and disqualified under sec. 53 of the Act. The Returning Officer gave effect to this objection, and put an end to the contest by declaring the respondent elected. That the Returning Officer so acted without authority is clear: see Pritchard v. Mayor of Bangor, 13 App. Cas. 241, at pp. 250, 253.

But it is said that quo warranto will not lie, and that the remedy was by petition. Sections 217 and 218 of the Municipal Act are referred to. They are:—

217. A municipal election may be questioned by an election petition on the grounds—

(a) (Corrupt practices, not in question here).

(b) That the person whose election is questioned was at the time of the election disqualified; or

(c) That he was not duly elected by a majority of lawful votes.

218. A municipal election shall not be questioned on any of the above grounds, except by an election petition.

The question here in brief is: might the return have been questioned under sec. 217, clause (c)?

Sections 217 and 218 are almost identical with sections 87 and 88 of the English Municipal Corporations Act, 1882. Section 225 of the English Act says: "225 (1). An application for an information in the nature of a quo warranto against any person claiming to hold a corporate office shall not be made after the expiration of twelve months from the time when he became disqualified after election."

My attention has not been called to any such provision in the Manitoba Act.

I am referred, on behalf of the respondent, to The Queen v. Morton, [1892] 1 Q. B. 39, where, at p. 41, A. L. Smith, J., said: "It was said that these two sections, of themselves, did away with proceedings by way of quo warranto excepting in cases of disqualification arising after election, and a passage in the judgment of Lord Halsbury in Pritchard v. Mayor of Bangor was read in that behalf. . . . It is not necessary to hold, and I do not hold, that in no case will proceedings by way of quo warranto lie excepting in the case of disqualifications arising after election. It is, however, clear that proceedings by way of quo warranto are abolished by the 87th section of the Act of 1882 in cases which come within that section; or, in other words, where a petition will lie, quo warranto will not. The question is, does the present case fall

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within either sub-sec. (c) or (d)? for, if it does, the rule must be discharged."

It is evident from The Queen v. Beer, [1902] 2 K. B. 693, that, even in face of the English sec. 225, the remedy by quo warranto is taken away only where an election petition will lie.

In The Queen v. Morton, the facts were, that at an election of an alderman for a borough there were two candidates, one of whom was the Mayor. The Mayor presided and voted for himself, which caused an equality of votes. He then gave the casting vote in his own favour, and declared himself elected. The rule for quo warranto was discharged, because the complaint was either disqualification or that the defendant was not duly elected by a majority of lawful votes, either of which grounds might have been the subject of petition.

Is the real complaint here that the respondent was not duly elected by a majority of lawful votes? If it is, the leave cannot be granted.

I think clause (c) of sec. 217 was intended to extend to cases where there had actually been a vote. The evils to be rectified under Part III. of the Act are corrupt practices or the exercise of the privileges of the Act by those to whom they are not accorded, whether as candidates or voters. The legislature would contemplate the carrying out of the election law by the named officers. The usurpation of office in disregard of the methods authorised was left to common law remedies.

I think an objection to a petition that the case was not within sec. 217 would have been much stronger than is the objection to quo warranto.

Tod's alleged disqualification for election cannot be regarded now, that being a matter to be dealt with in the manner prescribed by the Act. He was a candidate and had a right to go to a vote—all questions of qualification being left to petition proceedings: Pritchard v. Bangor, supra.

I do not find anything in the other matter raised to justify discussion of them.

The order for leave will go as asked.

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## MANITOBA.

PRENDERGAST, J. MARCH 8TH, 1912.

SINGLE COURT.

## HANEY v. WINNIPEG AND NORTHERN R. W. CO.

*Railway—Expropriation of Land—Agreement as to Price—Taking Possession—Arbitration.*

**Where no agreement has been made between a railway company and a land-owner as to the price of land required for the purposes of the railway, the fact that the land-owner has intimated to the company that he will not sell for less than a named price, and that the company have then taken possession, does not fix the price, even where the land-owner intimates that he will consider the taking of possession as an agreement to pay the price named.**

**Interim injunction to restrain the defendants from proceeding with an arbitration refused.**

Application by the plaintiff for an interim injunction restraining the defendants from proceeding with an arbitration.

J. B. Coyne, for the plaintiff.

O. H. Clark, K.C., for the defendants.

PRENDERGAST, J.:—The plaintiff need not shew his interest in the land; his having been served by the defendants with notice of arbitration proceedings gives him his status on this application.

The application is based on an alleged contract, whereby the defendants are said to have agreed to pay the plaintiff a stated price for the land, followed by their taking possession of the same.

I should probably hold that a prima facie case is made that the defendants have taken possession. But as to the defendants agreeing to pay any particular price, there is really nothing shewn except an intimation by the plaintiff that he would not sell for less than so much, and that he considered the defendants taking possession as an agreement on their part to pay that price. This taking possession surely does not constitute an agreement to pay the price asked, even if the plaintiff intimated that he would put that construction on the defendants' action. There is not the least evidence of an agreement as to price.

The application is dismissed with costs.

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THE

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## BRITISH COLUMBIA.

GREGORY, J. MARCH 8TH, 1912.

TRIAL.

## EDMONDS v. EDMONDS.

*Husband and Wife — Divorce — Pleading — Petition — Cruelty—Specific Acts — Adultery—Admissions by Husband—Want of Corroboration—Undefended Petition — Duty of Court—Practice—Irregularities.*

Where cruelty is alleged as ground for a divorce, the acts constituting the cruelty should be set out specifically in the petition.

The cruelty charged should be such as would cause danger to life, limb, or health, bodily or mental, or a reasonable apprehension of it.

As to adultery, the Court requires corroboration of an admission by the guilty party, unless the admission is entirely free from suspicion.

And *held*, in this case, that statements made by the husband in a letter to his wife and in conversation with her, were not such admissions of adultery as should, uncorroborated, be regarded as proof; and the wife's petition was dismissed, without prejudice to a fresh petition.

Irregularities in practice pointed out.

Where the petition is undefended, it is the duty of the Court to scrutinise the proceedings.

Petition for divorce.

Maclean, K.C., for the petitioner.

The respondent was not represented.

GREGORY, J.:—This is a petition for divorce brought by the wife against her husband, on the grounds of cruelty and adultery. It does not appear to me that either charge has been satisfactorily proved, nor that the allegation of cruelty has been properly made in the petition.



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The respondent is entitled to know the charges that he is expected to meet. The cruelty charged should be such as would cause danger to life, limb, or health, bodily or mental, or a reasonable apprehension of it: Russell v. Russell, [1895] P. 315; Tompkins v. Tompkins (1888), 1 Sw. & Tr. 168; and the acts constituting such cruelty should be specifically set out: Suggate v. Suggate (1858), 28 L. J. M. C. 7. See also Tims v. Tims, 15 B. C. R. 39.

Apart from the allegations in the petition, the evidence offered in support is exceedingly general and vague.

As to the question of adultery, it is the practice of Courts to require corroboration of an admission by the guilty party, unless the admission is entirely free from suspicion.

In Robinson v. Robinson and Lane (1858), 1 Sw. & Tr. at p. 393, Cockburn, C.J., says: "The admission . . . unsupported by corroborative proof, should be received with the utmost circumspection and caution; not only is the danger of collusion to be guarded against, but other sinister motives which might lead to the making of such admissions, if, though unsupported, they could effect their purpose, are sufficient to render it the duty of the Court to proceed with the utmost caution in giving effect to statements of this kind."

These remarks of Cockburn, C.J., are referred to in Williams v. Williams and Bafield (1865), L. R. 1 P. & D. 29.

The case of Maxwell's Divorce Bill, [1911] W. N. 220, referred to by Mr. Maclean, is meagrely reported, but the letter accepted by the House of Lords as evidence of adultery was evidently more definite and explicit than the one here; and it is quite consistent with the report of that case that there was also some evidence of corroboration.

The evidence of adultery relied on by the petitioner is a letter from the respondent, and the petitioner's oath that one day, on her husband's return from town (presumably after an absence of less than one day), she "accused him of having been away with other women, and he said, yes, he had, and he did not see any reason why he should not. He said, a man, it is quite allowable for a man to do that sort of thing." This is a very equivocal statement, and may mean many discreditable things short of an admission of adultery, and I cannot accept it in any way as an admission of adultery. It is suspicious, but suspicion is not sufficient,

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and I have no right, in the absence of other circumstances, to allow that suspicion to control my mind while interpreting the language actually used.

The letter goes further; it says: "No, I will not live with you any longer; you have found out I have been unfaithful and prefer being with Flo." In the statement of the petitioner and the quotation from the letter I have, I believe, set out every word of evidence offered to support the charge of adultery. To accept it as sufficient would, I think, be entirely to disregard the language of Chief Justice Cockburn, that an uncorroborated admission should be received with the utmost circumspection and caution. The suggestion of counsel is, that the respondent was openly living with another woman, but the petitioner gives no evidence of it; she does not even pledge her own oath that there is such a woman as the "Flo" referred to in the letter. The letter says that the petitioner has found out the respondent's unfaithfulness, but she herself tells the Court nothing of this. The community in which the parties lived is small; and, if the fact were so, there should be no difficulty in shewing that the respondent had at least been seen with Flo or other women, or some other circumstance corroborative of the admissions.

A divorce will not be granted upon an admission of adultery, unless the Court is satisfied that the admission is true. It is not inconceivable that a man might be willing to admit (not under the sanctity of an oath) that he had been guilty of such an act if he thought he would thereby enable his wife to obtain a divorce, while he would decline to commit the act for the same purpose.

The letter was written just before the presentation of the petition. It is apparently an answer to a previous verbal or written communication which has not been disclosed to the Court.

The petition will be refused; but, in view of the fact that it may be possible to furnish some evidence of corroboration, it will be without prejudice to the right of the petitioner to present a fresh petition.

I wish again to draw attention to the tendency to loose practice in divorce matters. (See Tims v. Tims, above referred to.)

I heard the evidence in this case after reserving the right to examine into the regularity of the proceedings if the evi-

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dence proved sufficient, etc. On looking at the papers on file, I find that the affidavit of non-collusion and verifying the statements in the petition does not identify the affiant with the petitioner; that the affidavit of service of the citation is made by the Deputy Sheriff and sworn before the Sheriff; that the citation was not, as required by Rule 13, filed in the registry forthwith after service; in fact, it was not filed until the day of the making of the order for trial. Until the citation is filed, the Court is not properly seised of the matter, and no application for trial or otherwise can be made until then. Rule 21 has not been complied with, inasmuch as there has been no order obtained determining whether there should be a trial with or without a jury, or whether the trial should be by oral evidence or upon affidavit.

In undefended divorce proceedings, it is the duty of the Judge carefully to scrutinise every step and see that every rule of practice and trial is strictly complied with: it is the duty of counsel to give the Court every assistance, and prepare their cases even more carefully than when they know they are to be defended.

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## BRITISH COLUMBIA.

CLEMENT, J. MARCH 12TH, 1912.

SINGLE COURT.

### DAVIE v. CITY OF VICTORIA.

*Municipal Corporation — Waterworks — Expropriation of Land—Award of Compensation—Right of Corporation to Withdraw—36 Vict. ch. 20, secs. 6 and 7 (B.C.)—Declaratory Judgment.*

The defendants, a city corporation, under the powers conferred by the Corporation of Victoria Waterworks Act, 36 Vict. ch. 20 (B.C.), took possession of the plaintiff's land for use in connection with the construction of a city waterworks system. An award of compensation was made in September, 1911; and, the defendants not having paid the amount, and no motion having been made to set aside or enforce the award, but the defendants having intimated that they proposed to abandon the proceedings and take a smaller portion of the plaintiff's land, the plaintiff brought this action for a declaration that the defendants were not entited to abandon; that the land was vested in them; and that they were entitled to enforce the award:—

*Held*, that the defendants, having once appropriated the lands, were not entitled to withdraw; and that the option given to the landowner by sec. 6 (n) of the Act, to resume possession in default of payment, was not to be treated as subversive of the whole scheme of the Act, but as a means of compelling payment; and the plaintiff was entitled to the declaratory judgment for which he asked.

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Motion by the plaintiff for judgment. The plaintiff was the owner of lot 34 Malahat district, bordering on Sooke Lake. The defendants, under the powers conferred upon them by ch. 20 of the statutes of 1873, took possession of this land in connection with the construction of a waterworks system for the City of Victoria. The parties not being able to agree as to the amount of compensation to be given for the land, the matter was referred to arbitration, and the sum of $13,500 was awarded the plaintiff. The award was made in September, 1911. The defendants had not paid the amount, but had intimated that they proposed practically to abandon the arbitration and take a smaller quantity of the plaintiff's land. On this decision being arrived at, the plaintiff commenced this action, alleging that the defendants had no power to abandon the award; that they had taken possession of the land, and, by virtue of the above-named statute, it was vested in them. No motion had been made to set aside or to enforce the award.

Maclean, K.C., for the plaintiff. The plaintiff cannot sue on the award, as the time for payment has not arrived. The defendants proceed under ch. 20 of the statutes of 1873, and ch. 64 of the statutes of 1892. Section 6 gives the Water Commissioner the right to appropriate land for the purposes set forth in the Acts, and sec. 7 provides that the land so taken shall be vested in the corporation absolutely. The compensation shall be ascertained, if necessary, by arbitration, and the defendants have six months in which to make payment of the amount awarded or agreed upon. If the defendants do not make such payment, the land-owner has the right to re-enter and resume possession. He is not compelled to resume possession; such right is only an additional remedy. Every act has been done to vest the property in the corporation, and the vesting in the corporation is not subject to the ascertainment and payment of compensation. The defendants' powers are equivalent to those of the Esquimalt Waterworks Company, and this point was decided by the Privy Council in Esquimalt Waterworks Co. v. City of Victoria, [1907] A. C. 499. See also Tawney v. Lynn and Ely R. W. Co. (1847), 16 L. J. Ch. 282; The King v. Hungerford Market Co. (1832), 4 B. & Ad. 327; Simpson v. South Staffordshire Waterworks Co. (1865), 34 L. J. Ch. 380. The defendants cannot withdraw from the transaction.

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McDiarmid and Copeman, for the defendants. We do not require the land; therefore, we have no power to take it.

CLEMENT, J.:—This case cannot be decided without having evidence, if that point is raised.

McDiarmid. It is in the discretion of the defendants to say how much land they will require. The question turns on the interpretation of secs. 6 and 7 of the Act. Sub-section (m) of sec. 7, which provides that the award of the arbitrators shall be binding on all parties concerned, must be subject to the divesting clause, which operates as a re-conveyance by statute. Under the divesting clause, the owner of the land has his remedy; in addition to which he is entitled to any damage which he may suffer. The defendants have a right to refuse to make use of the land. There is nothing analagous under the statutes which give us power to act, to a notice to treat under the English statute. Where a general intention is expressed, and also a particular intention which is incompatible with the general intention, the particular intention is considered an exception to the general one: see Churchill v. Crease (1828), 5 Bing. 177; Pilkington v. Cooke (1847), 16 M. & W. 615; Taylor v. Corporation of Oldham (1876), 4 Ch. D. 396; Rex v. Commissioners of H. M. Woods and Forests (1850), 19 L. J. Q. B. 497.

CLEMENT, J.:—On this record, in my opinion, the plaintiff is entitled to the declaratory judgment for which he asks in his statement of claim.

The case mainly relied on by Mr. McDiarmid—Rex v. Commissioners of H. M. Woods and Forests (1850), 19 L. J. Q. B. 497—was decided upon grounds of public policy which do not exist in the case of a municipal corporation. And, moreover, there is no allegation here that the financial limit, if any, may be overrun. Apart from that case, the line of authority in reference to private corporations is clearly in the plaintiff's favour.

The only doubt arises from the provision in clause (n) of sec. 6 of the Corporation of Victoria Waterworks Act, 1873, 36 Vict. ch. 20 (as enacted by 55 Vict. ch. 64, sec. 3), that the sum awarded is to be paid within six months from the date of the award, etc., and that, in default of such payment, the proprietor may resume possession of his property, and all his rights shall thereupon revive." On consideration,

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I construe this as an additional safeguard in the land-owner's favour and not as his only remedy. If the latter were intended, one would naturally look for some provision for payment of the damages and costs incurred by the land-owner through the locking up of his land and the time and expense involved in arbitration proceedings. There are no such provisions; and, to read the clause as a practical undoing of all that had been done, and as giving to the earlier and leading clauses an interpretation different from that which, according to all authorities, they should naturally bear, would be to make the Act an easy engine of oppression. In short, I think that, when once lands have been appropriated, the corporation are not entitled to withdraw, and that this option given to the land-owner to resume possession in default of payment within a certain time-limit is not to be treated as subversive of the whole scheme of the Act, as indicated in its leading clauses, but simply as a weapon to compel reasonably prompt payment by a municipal corporation, which ordinarily cannot be forced to speedy action.

The plaintiff is entitled to his costs.

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## ALBERTA.

HARVEY, C.J. MARCH 8TH, 1912.

SINGLE COURT.

### MEUNIER v. CANADIAN NORTHERN R. W. CO.

### RIOPEL v. CANADIAN NORTHERN R. W. CO.

### LAVALLEE v. CANADIAN NORTHERN R. W. CO.

*Reference — Form of Judgment — Final Judgment for Amount of Damages Found by Referee—Report—Finding of no Damage—Appeal or Motion to Vary—Jurisdiction of Judge in Court—Failure of Referee to Perform Duty — Jurisdiction of Judge in Court to Give Direction—Scope of Reference—Direction to Complete—Pleading—Amendment—Stage of Proceedings.*

In three actions for trespass to land, the judgments were the same—"that the plaintiff do recover against the defendants such amount for damages for the wrongs complained of as shall be found and ascertained by the Clerk of this Court . . . , to whom it is

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**referred to ascertain the same." In each action, the Clerk made a report, finding no amount for such damage, but expressing the opinion that the damage was due to the plaintiffs themselves and a third person not repairing the fences. The plaintiff in each action moved to have the report varied by inserting the proper amount of damages, or for a reference back:—**

***Held*, that the reference was not the usual one for inquiry and report; the amount of damage as found by the Clerk must be the amount of the final judgment; and any appeal from his finding must be as an appeal from the final judgment; and, therefore, a single Judge in Court had no jurisdiction to hear the motion as now made, which was in the nature of an appeal from the report.**

***Held*, however, that the Clerk, in failing to make a finding of the amount of damage, as directed, had misconceived his duty; as an officer of the Court, he was subject to direction as to the performance of his duty; and in that aspect the Judge in Court had jurisdiction to deal with the application, changing its form.**

**It was not within the scope of the reference for the Clerk to relieve the defendants of the liability with which they were fixed, by finding that the damage could have been avoided.**

***Held*, also, that the Judge in Court had power, even after judgment and report, to allow an amendment of the statement of claim; and amendments should be made.**

**An order was made, without costs, allowing the amendments asked by the plaintiffs, and directing the Referee to complete the reference and certify the amount of damages.**

Motion by the plaintiff in each action to vary the report of the Clerk of the Court or for a reference back.

E. B. Edwards, K.C., for the plaintiffs.

S. B. Woods, K.C., for the defendants.

HARVEY, C.J.:—These cases came on for trial before Mr. Justice Stuart on the 11th November, 1910, when, on the pleadings and admissions of counsel, he directed judgment for the plaintiffs, and a formal judgment was taken out in each case containing the following term: "It is this day adjudged that the plaintiff do recover against the defendants such amount for damages for the wrongs complained of as shall be found and ascertained by the Clerk of this Court at Edmonton, to whom it is referred to ascertain the same."

The wrongs complained of are the same in each case and are set out in the statement of claim as follows: "In or about the months of May and June, 1909, the defendants wrongfully and unlawfully broke and entered upon the said lands and cut and broke down the fences thereof," etc.

Under the reference, evidence was taken before the Clerk, tending to shew the breaking and non-repair of the fences and damage by cattle obtaining access thereby. In each case the Clerk has made a report finding no amount for such damage, but expressing the opinion that such damage was

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due to the plaintiffs themselves in two of the cases, and of a third person in the other case, in not repairing the fences.

The plaintiff in each case now applies, on various grounds specified, to have the report varied by inserting the proper amount of damages, or to have it referred back with directions; or for such other order as may seem just.

Counsel for the defendants objects that there is no jurisdiction to hear the application, which is in the nature of an appeal from the Clerk's report.

In Marsan v. Grand Trunk Pacific R. W. Co., 17 W. L. R. 693, Mr. Justice Beck points out the usual practice in this Court to be the making of references, not for trial, but for inquiry and report, involving a motion for adoption or as the case may be, and the advisability of such a practice. I think, without exception, the references I have directed have been of that character; but, in my opinion, the reference in this case is not of that character. The judgment of the trial Judge distinctly states that the plaintiff shall be entitled to final judgment for the amount the Clerk may ascertain. If that judgment is wrong, I certainly cannot change it; and, inasmuch as it has been confirmed by the Court en banc, 17 W. L. R. 539, though not questioned on this ground, I think that I may consider that its validity cannot be questioned.

In my opinion, the amount of damage as found by the Clerk as Referee must be the amount of the final judgment; and any appeal from his finding must be as an appeal from the final judgment. I think, therefore, that the defendants' counsel's objection is well taken to the form of the application. The Referee, however, has made no finding of the amount of damages: and if, in reaching the conclusion he has reached, he has misconceived his duty, and has failed to make the finding directed, the matter is still open; and, as an officer of the Court, he is subject to direction as to the performance of his duty. In that aspect, I think I have jurisdiction to deal with the application, though its form is in reality that of an appeal from the Referee's report.

In my opinion, the Referee has misconceived his duty. The question of liability is settled by the order of reference; and it is not within the scope of the Referee's power to relieve the defendants of the liability with which they are fixed, by findings that the damage could have been avoided, if something else had been done by the plaintiffs or any one else. The only matter referred to him is the amount of the

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damage. That should be ascertained and certified by him, and final judgment can then be entered for that amount.

In each statement of claim, particulars of the character of damage are given; but in the Riopel case particulars of damage by trespassing cattle are omitted. This, the plaintiffs' counsel explains, was due to inadvertence, and apparently it was only discerned by counsel on this application, as the proceedings in all the cases have been taken together, and evidence on this point was given before the Referee. The plaintiff Riopel asks to have the claim amended in this respect; and, if I have power to make the amendment at this stage, it is certainly a proper one to make. In one of the cases, also, the evidence indicates that the breaking of the fences occurred at two different times in the same season, the second not being specified, and leave to amend to specify this is asked. As the case is still open and properly before me, though not free from doubt, I think I have power. It is not necessary, however, to consider the matter fully, because I understand counsel for the defendants to consent to the amendments being made if there were no costs of the application, which, in my opinion, there should not be, both because of this indulgence and because, if the application had been for only what the plaintiffs are entitled to, the defendants might perhaps not have opposed it; indeed, on the argument the defendants' counsel offered to consent to the order I am making if there were no costs. The order will go, therefore, without costs, for amendment as asked, and directing the Referee to complete the reference and certify the amount of damages.

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## MANITOBA.

OCTOBER 27TH, 1911.

COURT OF APPEAL.

### ALDOUS v. GRUNDY.

*Principal and Agent—Agent's Commission on Sale of Land —Revocation of Agent's Authority—Purchaser Procured —Compensation for Services—Quantum Meruit.*

The judgment of MATHERS, C.J.K.B., 17 W. L. R. 230. was affirmed on appeal.

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Appeals by both parties from the judgment of MATHERS, C.J.K.B., 17 W. L. R. 230.

The appeals were heard by HOWELL, C.J.M., RICHARDS, PERDUE, and CAMERON, JJ.A.

D. A. Stacpoole, for the defendant, cited Ring v. Potts, 36 N. B. R. 42; Rosenbaum v. Belson, [1900] 2 Ch. 267; Prickett v. Badger, 1 C. B. N. S. 296.

A. C. Galt, K.C., for the plaintiffs, cited Burchell v. Gowrie and Blockhouse Collieries Limited, [1910] A. C. 614, C. R. [1910] A. C. 250; and Stratton v. Vachon, 44 S. C. R. 45.

THE COURT dismissed both appeals.

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## ALBERTA.

HARVEY, C. J. MARCH 8TH, 1912.

TRIAL.

## FRITH v. ALLIANCE INVESTMENT CO.

*Vendor and Purchaser—Contract for Sale of Land—Agreement to Repurchase—Statute of Frauds, sec. 4—Pleading—Counterclaim—Defence to Action — Discharge or Evidence of Abandonment—Equitable Relief—Judicature Ordinance, sec. 8 (11).*

To an action for specific performance of an agreement for the sale of land by the defendant to the plaintiff for $641.25, the defendant set up that it repurchased the land, by agreement, for $900, and counterclaimed for specific performance of this agreement. The plaintiff replied that the second agreement did not comply with the Statute of Frauds; and, as a defence to the counterclaim, alleged fraud. At the trial, the Statute of Frauds was treated as if it were pleaded to the counterclaim:—

*Held*, that the defence of fraud, set up against the counterclaim, failed on the evidence; but that the defendant could not succeed upon the counterclaim, because the agreement for repurchase was not in writing, and there was no memorandum of it in writing sufficient to satisfy the Statute or Frauds.

*Held*, however, that the agreement to repurchase was clearly established by the evidence; and, although, by sec. 4 of the Statute of Frauds, no action could be brought by which to charge a party to it, it might be set up as a defence to the plaintiff's action. The subsequent agreement might be considered as a discharge or evidence of abandonment of the original agreement. Section 4 of the statute applies, not to the validity of the countract, but to proceedings upon it.

Review of the authorities.

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*Held*, therefore, that the defendant was entitled to succeed in the main action, which was for equitable relief; and, even if an amendment were made setting up a claim for damages in the alternative, the plaintiff would, in view of sec. 8 (11) of the Judicature Ordinance, be in no better position.

The plaintiff sued for specific performance by the defendant, the vendor, of an agreement for the sale and purchase of certain lots near the city of Calgary for $641.25. The defendant company alleged that it repurchased the lots, by agreement, for $900, and counterclaimed for specific performance of this agreement. The plaintiff replied that the second agreement did not comply with the Statute of Frauds, and, as a defence to the counterclaim, alleged that the defendant purported to act as agent for the plaintiff, and to be selling to a third person, whereas it was really trying to buy for itself, thereby committing a fraud on the plaintiff.

J. L. Jennison, K.C., for the plaintiff.

W. T. D. Lathwell, for the defendant company.

HARVEY C.J.:—The evidence and the argument at the trial had reference to the counterclaim, the plaintiff's right being apparently conceded, unless the defendant could establish its right under the counterclaim, and the plea of the Statute of Frauds was treated as being raised on the counterclaim, though, in fact, it is only pleaded in reply to the defence. I decided that in the defence raised to the counterclaim the plaintiff failed, it having been established to my entire satisfaction that the plaintiff knew that he was dealing with the defendant as purchaser, and that no advantage whatever had been taken of him. I decided, also, that the defence of the Statute of Frauds, which had been argued, was a good defence to the counterclaim, and stated that the counterclaim would be dismissed, but without costs, owing to the nature of the defence and the conduct of the plaintiff; and consequently, as appeared to have been conceded, that there would be judgment for the plaintiff on the claim for specific performance, but without costs. Counsel for the defendant then suggested that, though the agreement to sell back might not be a good agreement within the Statute of Frauds, it might be sufficient as a defence to the plaintiff's action. As this point had not been argued, I directed an argument on it, staying the entry of judgment in the meantime.

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On the new argument, the point was raised that the Statute of Frauds is not pleaded to the counterclaim. I decide on this point that, owing to the course of the trial, the defendant should not be allowed to take such an objection now, and that the pleadings should be deemed to be amended so as to raise the defence which counsel assumed, until after the case was closed, was raised.

The evidence shews that for some time the plaintiff had been expressing dissatisfaction regarding the land which he had bought from the defendant, and that he asked its officers to try and sell it for him, giving them the price as $900, payable one-third cash and balance in 3, 6, and 9 months. Not finding a purchaser, the defendant decided to take the property back on the plaintiff's terms and have no more trouble about it. Accordingly, a cheque for $50 in favour of the plaintiff was issued and a receipt prepared setting out the terms as understood to be offered by the plaintiff as "one-third cash and balance in three quarterly payments in 3, 6, and 9 months." These were sent to the plaintiff, who, instead of accepting the cheque and signing the receipt, came to the defendant's office and began negotiating for better terms, when it was finally agreed that the terms should be one-third cash and the balance in two equal payments in 3 and 6 months. The plaintiff thereupon changed the receipt by striking out "and 9" and making it read "balance in three quarterly payments in 3 and 6 months," leaving it containing a contradiction in its terms. The agreement is clearly established by the evidence, but its terms are not set out in any memorandum in writing, in default of which it is declared by the 4th section of the Statute of Frauds that no action can be brought by which to charge a party to it. Can it then be set up as a defence to the plaintiff's action?

In Brown on the Statute of Frauds, par. 122, it is stated: "As a general proposition . . . a verbal contract within the statute cannot be enforced in any way, directly or indirectly, whether by action of in defence;" but it is pointed out that there are certain exceptions to this rule, and the rule itself seems to rest chiefly on American authorities. In the notes to Simons v. New Britain Trust Co. (1907), 11 Am. & Eng. Ann. Cas. 477, authorities are cited from fourteen States for the view that an oral contract, within the Statute of Frauds, cannot be set up as a defence; while, for the opposite view, that it may be a defence, author-

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ities are cited from two States, as well as from England and Ontario, the latter being Miles v. New Zealand Alfred Estate Co., 32 Ch. D. 266, and McGuiness v. Kennedy, 29 U. C. R. 93.

In the former of these two cases, at p. 279, North, J., the Judge of first instance, states that an oral agreement may be set up by a defendant, and says: "It seems to me I should be enlarging that section of the Statute of Frauds if I said the plaintiff was entitled to set up the Statute of Frauds in answer to the case made by the defendants." In appeal, the only Judge who considered this point was Bowen. L.J., who agrees with the conclusion of North, J., and says at p. 296: "The only effect of the Statute of Frauds is to prevent the active prosecution of claims in the law Courts which are not supported by written evidence at the trial."

In the McGuiness case, the defendant had leased certain land to the plaintiff, and at the time of the lease there had been an oral agreement that the defendant should have the crops then growing on the land. In a common law action brought by the plaintiff against the defendant for taking these crops, it was held that the oral agreement was a good defence, and the plaintiff could not answer it by pleading the Statute of Frauds. At p. 97 of the judgment, which was delivered by Richards, C.J., it is stated: "The agreement, being under the fourth section of the Statute of Frauds, is not void; it is still good. The defendant is not bringing an action on it, he is merely justifying his own act under a valid agreement, though he could not in law bring an action on that agreement."

A decision in our own Court, Eaton v. Crook, 3 Alta. L. R. 1, is to the same effect. The plaintiff sued the defendant for a sum of money due under a contract. The defendant alleged and proved that there was an oral agreement that the plaintiff was to accept certain land in lieu of cash. It was held both at the trial and on appeal that this was a good defence, and that the plea of the Statute of Frauds furnished no answer. That case is the exact converse of the present one. In it the plaintiff orally agreed to take land instead of money; in this he orally agreed to take money instead of land. The only difference is that in Eaton v. Crook the agreements were contemporaneous, while in the present case the agreement sought to be set up as a defence is subsequent to the main or original agreement.

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This suggests another aspect of the case under which the subsequent agreement may be considered as a discharge or evidence of abandonment of the original agreement, and on the authorities there appears no doubt that it may be considered for that purpose. The fact that it was in its terms a definite contract for sale of the lands appears to be immaterial, because any agreement which would discharge a contract for the sale of land would effect a resale of the purchaser's interest to the vendor, and would, therefore, in effect, be a contract for the sale of an interest in land, and so come within the 4th section of the statute.

In Goss v. Lord Nugent, 5 B. & Ad. 58, Denman, C.J., in delivering the judgment of the Court of King's Bench, at p. 65 says: "It is to be observed that the statute does not say in distinct terms that all contracts or agreements concerning the sale of lands shall be in writing; all that it enacts is, that no action shall be brought unless they are in writing, and, as there is no clause in the Act which requires the dissolution of such contracts to be in writing, it should rather seem that a written contract concerning the sale of lands may still be waived and abandoned by a new agreement not in writing, and so as to prevent either party from recovering on the contract which was in writing."

Browne, as par. 434 et seq., points out that there is still a divergence of opinion as to the correctness of the above proposition in actions at law; but in par. 433 he points out that in actions in equity it is firmly established by many authorities "that a parol discharge of a written contract within the Statute of Frauds is available to repel a claim upon that contract."

In MacPherson v. Warner, 9 Times L. R. 397, the plaintiff had been engaged by the defendant for a term of five years. In the second year of the engagement, the defendant assigned his business to a joint stock company, when an oral arrangement was made whereby the plaintiff should receive only half the agreed salary until the profits of the company reached a certain sum, the defendant agreeing to make up the difference. The action was for the difference, either as balance of salary originally agreed to, or, in the alternative, as the difference subsequently agreed to be paid. Baron Pollock held, with regret, that the plaintiff could not succeed on either ground, because the second agreement, not being in writing, as required by the 4th section, would not

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support the action, and because the first agreement was not in effect, having been rescinded by the subsequent oral one.

These cases are all considered in an article in the Law Quarterly Review, vol. 9, p. 366, as well as an unreported case to the same effect, Todd v. Johnston (1892), decided by Day and Charles, JJ. In that case, the defendant owed the plaintiff £75, and it was orally agreed that he would accept £25 and a promise of employment for two years. The defendant refused to carry out the promise of employment, and the action was brought for the balance of £50. It was held that the oral agreement was a good defence, though unenforceable for want of writing.

The author of the article expresses the opinion that the decisions I have referred to are in conflict with earlier decisions, but assumes "that they are correct by reason of the altered views of the Judges as to the validity or invalidity of contracts that do not satisfy the requirements of the Statute of Frauds."

The earliest case mentioned is Case v. Barber (1681), Sir T. Raym. 450 (83 Eng. Rep. 235), in which it was held that a plea that a debt had been satisfied by an oral promise of a third party to pay a certain sum was not a good plea, the promise being unenforceable. This case was cited in Todd v. Johnson, which appears to be a parallel case, but the Court refused to follow it, and impliedly, if not expressly, overruled it. Moore v. Campbell (1854), 23 L. J. Ex. 310, and Noble v. Ward (1866), L. R. 1 Ex. 117, and (1867), L. R. 2 Ex. 135, the other earlier cases, are both on the 17th section of the Statute of Frauds, and were cited in some of the later cases. The author in the commencement of his article states that Brittain v. Rossiter (1879), 11 Q. B. D. 123, is authority for the view "that, notwithstanding the difference of the words 'no action shall be brought,' &c., in sec. 4, and 'no contract . . . shall be allowed to be good,' &c., in sec. 17, there is no difference in the effect of the two sections on contracts that do not satisfy their provisions." It is true that in Brittain v. Rossiter, though the 17th section was not in question, Brett, L. J., did say at p. 127: "In my opinion, no distinction exists between the 4th and the 17th sections of the statute; at all events the contract is not void under the 4th section;" and Thesiger, L. J., at p. 132, after stating that an oral contract under sec. 4 is not void, says: "It may also be urged with some shew of reason that,

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though there is a difference in language between the 4th and 17th sections of the Statute of Frauds, they are substantially identical in construction." These statements are, however, at variance with the statements of many other Judges.

In Moore v. Campbell, which, as stated, was on the 17th section, in the judgment of the Court, which was delivered by Parke, B., at p. 313, it is stated: "The agreement was void, there being neither note in writing nor part payment nor delivery and acceptance of part or all." And in Noble v. Ward, Bramwell, B., in the Court of Exchequer, said: "The expression 'allowed to be good' in that section is not a very happy one; but, whatever its meaning may be, it includes this, at least, that it shall not be valid or enforced." In the same case, on appeal to the Exchequer Chamber, the judgment of the Court was delivered by Willes, J., who says: "The contract was invalid for want of compliance with the formalities required by sec. 17 of the Statute of Frauds;" and later he accepts the words I have quoted from the judgment of Parke, B. On the other hand, in Brittain v. Rossiter it was, as appears from the extracts quoted, distinctly held that the oral agreement within sec. 4 was not void; and this point came up directly in Leroux v. Brown (1852), 22 L. J. C. P. 1, and it was there held that sec. 4 applied to procedure only, and not to the validity of the contract. Jervis, C. J., at p. 4, says: "I am of opinion that the 4th section does not apply to the solemnities of the contract but to the proceedings upon it. . . . The 4th section, looked at in contrast with the 1st, 2nd, 3rd, and 17th, leads to this conclusion."

In a foot-note to the article in the Law Quarterly to which I have referred, the learned editor, Sir Frederick Pollock, states that he is at a loss to understand how any Court below the House of Lords could disregard the unanimous and quite modern decision of the Exchequer Chamber in Noble v. Ward. The answer to that appears to me to be, that there is a clear distinction between the effect of sec. 4 and sec. 17; and that, consequently, Noble v. Ward is no authority for a similar case under sec. 4. I feel no doubt that Leroux v. Brown would not have decided as it was, if the case had been under sec. 17 instead of sec. 4.

Even in Noble v. Ward, it is suggested that, if the oral agreement was clearly intended as a rescission of the original



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agreement, effect might be given to it for that purpose, which is the point now under consideration.

Under the authorities I have cited, by one of which I am bound, I am of opinion that the defendant ought to succeed in the main action, which is for equitable relief by way of specific performance; and, even if the claim were amended to permit of a claim for damages being set up in the alternative, in view of sec. 8 (11) of the Judicature Ordinance, which provides that rules of equity shall prevail if they differ from the rules of law, the plaintiff would be in no better position, since the defendant has in no way repudiated the oral agreement; and, even if it had, if MacPherson v. Warner is correctly decided, it is doubtful whether he could recover on it.

The action will be dismissed with costs. As already stated, the counterclaim is dismissed without costs.

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## ALBERTA.

HARVEY, C.J. MARCH 9TH, 1912.

TRIAL.

### DODGE v. WESTERN CANADA FIRE INSURANCE CO.

*Fire Insurance — Buildings "in Course of Construction"— Misleading Description—Avoidance of Policy.*

Buildings described in the application and policy as "in course of construction" were insured against fire for a short period, at a high rate, by the defendant. The buildings were in fact partly constructed, but work upon them had ceased before the application, and was not resumed. The buildings were destroyed by fire one day before the policy expired. There was no evidence fixing the defendant or its agents with knowledge of the facts:—

*Held*, that, while the term "in course of construction" might be an apt description of a condition as well as a process, the evidence led to the conclusion that it should be construed as meaning, in the present case, "in process of construction," indicating proceedings for construction; and, so construed, was a misleading and inaccurate description; and, under the conditions, avoided the policy.

*Dodge* v. *York Fire Insurance Co.*, 18 O. W. R. 211, distinguished.

Action for indemnity for loss by fire.

J. M. Carson, for the plaintiff.

A. H. McGillivray, for the defendant.

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HARVEY, C.J.:—The plaintiff lives in Massachusetts; the defendant has its chief place of business in this province; the property insured and destroyed was situate in Ontario; and the policy covering it is on the Quebec statutory form. The plaintiff sued another company in Ontario, the York Fire Insurance Company, in respect of the same fire, and succeeded in recovering. The case went to the Supreme Court of Canada, but the judgments there are not yet reported. The report in the Ontario Courts is to be found in 18 O. W. R. 211. Certain of the evidence taken in that case is, by consent, put in evidence in this case, in addition to which there is evidence taken on commission; but no oral evidence was given.

The pleadings raise many defences; but, by reason of certain admissions and of the decision in the other case, most of these are unavailable. The only defences raised by counsel on the argument before me are:—

(1) There was no watchman at the time of the fire.

(2) The buildings were not "in course of construction," as described in the policy.

(3) There was further insurance, and it does not appear that it was consented to.

I consider only the second of these defences, because it appears to me to be valid. In the York case the trial Judge, one of the Judges of the Court of Appeal, and one of the Judges of the Supreme Court of Canada, considered that the description "in course of construction," which was furnished there, as here, to the company, was an inaccurate description of the insured premises. The other members of both Courts of Appeal were of opinion that, under the circumstances of the case and with the information conveyed to the company, it could not be misled by the description, which is declared to be "ambiguous."

The buildings were partly constructed, but the work of construction ceased at the end of February. A watchman remained on the premises until the 18th May, when he left, having first fastened the doors and boarded up the windows; the buildings remained in that condition till the fire. On the 8th February the York company had insured the building, in the name of the owner, with loss payable to the plaintiff as mortgagee, for the sum of $2,500, for one month, the premium being $3.75 or at the rate of $45 a year, being 1 4/5 per cent. On the 9th March, a new policy was

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issued, in the same terms, for the same amount. In June, an application was made for insurance, in respect of which the action in Ontario was brought. It was stated that the property was the same as covered by the former policy, but that the watchman had been withdrawn, and the rate raised on that account to 3 per cent., and that the buildings had not been completed owing to financial difficulties, and that the plaintiff hoped to have control before the expiry of the policy; $2,000 being applied for, to make up $8,100, the particulars of the other $6,100 being given. The policy was issued on the 25th June, covering the property from the 24th June to the 2nd November. The premium is stated to be $31.80. It may be observed that this is about 4½ per cent., and not 3 per cent.; but the letter of the agents applying for it indicates that something is added to the 3 per cent. to make up the premium of $31.80.

On the 14th August, the defendant company issued a policy for $1,000, covering the property, described in the same terms as in the York company policies, from the date of the policy to the 2nd November; the premium being $11.55, which, a computation shews, is at a rate in excess of 4½ per cent., though the evidence of the agent who placed it is, that the rate was to be 3 per cent. On the 1st November, the day preceding the expiration of the policies, the buildings were entirely destroyed by fire.

There is no evidence fixing the defendant in the present case, or its agents, with knowledge of the facts which were within the knowledge of the York company's officers, which I have mentioned; and, while I would be of opinion that the term "in course of construction" might be an apt description of a condition as well as of a process, what evidence there is leads me to the conclusion that, in the present case, it should be construed as meaning "in process of construction," indicating proceedings for construction, for the plaintiff's witness, who procured the insurance, states that he said: "I only want it until the 2nd November; this is builder's risk, rate 3 per cent. When he was asked, in cross-examination, what he meant by "builder's risk," the plaintiff's counsel objected to his giving expert evidence, and he gave no further explanation than: "It is chiefly one in which a building is in course of construction, as the wording of the application called for." There may be a technical meaning for the term; but, at any rate, it suggests

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that there is a risk connected with building which this came within; and that, therefore, it was for the purpose of covering building operations.

In view of the actual circumstances of these buildings, a description which indicated that building operations were proceeding, which the term "in course of construction," coupled with the statement made by the applicant for insurance, did, was a misleading and inaccurate description and under the condition avoids the policy.

Were it not for the suspicion which naturally arises from the burning of heavily insured buildings, which were in the physical and financial condition these were, within a day of the expiration of the policies, which suspicion, however, may be entirely without foundation in fact, I should regret very much being obliged to come to the conclusion I do; for the defendant had the benefit of the premium; and, from the evidence given, I do not doubt that the insurance would have been accepted, even though all the facts had been made known.

The action is dismissed with costs.

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## ALBERTA.

SIMMONS, J. MARCH 14TH, 1912.

TRIAL.

## DUNLOP v. BOLSTER.

*Vendor and Purchaser—Contract for Sale of Land—Default in Payment of First Instalment of Price—Acceleration Clause—Cancellation Clause — Election of Remedy by Vendor — Tender — Right to Cancel—Specific Performance—Purchaser's Action — Terms—Payment of whole Purchase-price in Short Period—Costs.*

An agreement for the sale and purchase of land, at the price of $20,000, made on the 20th June, 1911, provided for payment of $50 cash, $4,950 in 30 days, and the balance in two deferred payments in one and two years with interest; that time should be of the essence of the agreement; that, if default were made in payment of the principal or interest or any part thereof, the whole purchase-money should become due; and also that, on default, the vendor should have the right to determine the agreement, by notice. The purchaser did not make the payment of $4,950 in 30 days; and on the 19th October, 1911, the vendor brought an action to recover the whole purchase-money and interest, invoking the acceleration clause, and for other and alternative relief: That action was discontinued by

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**the vendor on the 29th November, 1911; and on the 30th November, 1911, the purchaser tendered $4,950 and interest to that date. The tender was refused; and the vendor, on the 19th December, 1911, gave the purchaser notice of termination of the agreement. On the 12th December, 1911, the purchaser began this action for specific performance of the agreement, and brought into Court $4,950 and interest to that date:—**

***Held*, that the vendor, the defendant, could not, in the circumstances, exercise the right of cancellation; and the plaintiff was entitled to have the agreement specifically performed; but the Court had a discretion to impose terms, and the terms should be, payment of the full purchase-price within 10 days, costs being reserved until the expiry of the ten days.**

Action by the purchaser for specific performance of a contract for the sale and purchase of land.

H. H. Parlee, for the plaintiff.

G. B. O'Connor, for the defendant.

SIMMONS, J.:—By an agreement in writing of the 30th June, 1911, under seal, the plaintiff and defendant agreed that the defendant should sell to the plaintiff, who agreed to purchase from the defendant, the north-east quarter of section 35, township 53, range 25, west of the 4th meridian, containing 160 acres, at $125 per acre, payable $50 cash and $4,950 in 30 days and the balance in equal payments of $7,500 in one and two years, with interest at 7 per cent. per annum. It was provided that time should be of the essence of the agreement, and further provided that, if default were made in payment of the principal or interest or any part thereof, the whole purchase-money should become due and payable. It was also provided that, in default of payment by the plaintiff of the purchase-money and interest or any part thereof as provided in the agreement, the vendor should have the right to determine the agreement and retain any sum paid thereunder by way of liquidated damages, by mailing a registered notice signed by the vendor intimating his intention to determine the agreement, and addressed to the purchaser at ——— post office, and if, at the end of 20 days from the time of mailing the said notice, the purchaser failed to pay the amount due, the purchaser should deliver up possession of the lands at the expiration of the said 20 days.

The plaintiff did not make the payment of $4,950 in 30 days as provided for in the agreement, and on the 16th September, 1911, the defendant wrote to the plaintiff, who resided at Eady, Ontario, complaining of the plaintiff's delay

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in making the said payment of $4,950, and asking the plaintiff to let him know by return mail "what you expect to do—I will give you time to get reply to me." The plaintiff did not reply, apparently, to this letter; and the defendant, on the 19th October, 1911, commenced an action against the plaintiff, setting out the agreement hereinbefore referred to and the default of the purchaser in making the payment of the instalment of $4,950, and claiming that, by virtue of the acceleration clause in the agreement, the whole purchase-price of $20,000 and interest was due. The vendor, in that action, claimed:—

1. Payment of the sum of $20,359.36 and interest thereon and costs.

2. That, in default thereof, the defendant's interest in the land (if any) may be sold and the proceeds of sale applied in or towards payment of the debt and costs, and that the defendant may be ordered to pay the balance of the mortgage debt and costs after deducting the amount realised by such sale.

3. Judgment for the immediate recovery of the said sum of $20,359.36 and interest and the costs of this action.

4. Recovery of possession of the said land.

5. For the purposes aforesaid all proper directions to be given and accounts taken.

6. Such further and other relief as the nature of the case may require.

In order to obtain an order for service of the writ upon the defendant in Ontario, the vendor, Bolster, made an affidavit as follows:—

"I, Ulysses S. Bolster, of the city of Edmonton, in the province of Alberta, real estate agent, make oath and say:—

"1. I am the plaintiff in this action.

"2. I am desirous of commencing an action in this Honourable Court, against the above named defendant, for the purpose of recovering the sum of $20,359.36 and interest and the costs of this action, and such other relief as the nature of the case may require, under an agreement for sale dated the 20th day of June, A.D. 1911, respecting the north-east quarter of section 35, in township 53, in range 25, west of the 4th meridian, the said lands being within the jurisdiction of this Honourable Court.

"3. Now shewn to me and marked as exhibit A to this my affidavit is a copy of the proposed statement of claim.

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"4. I have a good cause of action against the said defendant in respect of the matters aforesaid.

"5. The said Samuel B. Dunlop, resides at Eady, in the province of Ontario, and is a British subject."

The affidavit was filed on the 19th October, 1911; the jurat was left undated.

To this action the vendor filed a discontinuance on the 29th November, 1911; and on the 30th November the purchaser, Dunlop, tendered $5,234.02 for the payment of principal and interest, which was to be paid 30 days after the date of the agreement.

On the 19th December, 1911, the vendor mailed to the purchaser at Eady post office, Ontario, by registered mail, the following notice: "Take notice that I intend to determine the agreement made with you dated the twentieth day of June, A.D. 1911." And on the 12th December, 1911, the purchaser, Dunlop, began this action for specific performance. and paid into Court $5,216, for the instalment of $4,950 and interest, which fell due 30 days after the date of the agreement.

The procedings in the former action were put in as an exhibit by the plaintiff in this action, and the defendant's counsel made a statement in Court to the effect that the action of the 19th October was commenced through a misapprehension of the instructions of the client to his solicitor, and that the instructions were to take proceedings to have the contract cancelled. The defendant (Bolster) did not go into the witness-box to confirm this; and it is impossible to reconcile such an intention with the affidavit which he made, above-quoted.

The plaintiff has also submitted evidence to the effect that the land was rapidly increasing in value between these periods, and is now worth about $300 per acre. I think it is quite clear that, in view of the small amount of principal moneys paid on the date of the execution of the agreement, and the large payment which was to be made in 30 days having fallen in arrears, the vendor might very properly have proceeded to have the contract cancelled by serving a notice on the purchaser of his intention to do so if the payment of arrears was not made within the time called for in the notice. It is quite clear, both from his letter and from the proceedings in the action of the 19th October, instituted by the vendor, that he was very anxious to compel the plaintiff-pur-

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chaser to fulfil his contract by making the payment in arrears at least. What his intentions were between the date of discontinuance of that action and the service of the notice of cancellation, is not disclosed; but, in the meantime, the purchaser made a tender of the payment in arrears, which the vendor refused to accept; and at that time it is impossible to say what the vendor's intentions were, namely, whether he intended to insist upon payment of the instalment which had fallen in arrears, or the payment of the whole purchase-price with interest, or cancellation of the agreement on account of default of payment of the whole purchase-price. In view of this, I fail to see how he can now claim the right to cancel the agreement.

As to the terms on which specific performance should be granted, the Court has a discretion; and the plaintiff was in arrears for a considerable period of time on a somewhat large payment; and it is quite clear that the intention of the agreement was, that the whole purchase-price should become due under such circumstances, unless there was a waiver by the vendor of his right to insist on the same.

There will, therefore, be judgment for specific performance by the defendant of the agreement for sale, upon payment by the plaintiff of the full amount of the purchase-price, $19,959, and interest to this date, into Court, within 10 days from this date, the amount paid into Court by the plaintiff to be applied on account thereof; the question of costs reserved until subsequent to the expiry of the said ten days, with leave to either party to apply at the end of the said 10 days as they may be advised.

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## SASKATCHEWAN.

MARCH 9TH, 1912.

SUPREME COURT EN BANC.

## RICHARDSON v. RAMSAY.

*Vendor and Purchaser—Contract for Sale of Land—Formation of Contract—Offer to Purchase—Condition—Non-fulfilment — Absence of Waiver — Letter Relied on as Acceptance—Construction — Evidence — Letter Marked for Identification Treated at Trial as before the Court—Objection Raised on Appeal.*

The defendant made an offer in writing to a company, upon a form of application supplied by the company, to purchase, subject to certain conditions set out in the document, 5 lots of land, for $200. The document read: "I . . . enclose herewith $20 to be applied as deposit on first payment of $50 on purchase. I agree to pay the balance as follows . . . and to execute the usual contracts of the company. If . . . this contract cannot be accepted, please advise me . . ." One of the conditions was: "No application will be considered by the vendors unless properly signed by the applicant and accompanied by the cash payment . . . nor will the vendors guarantee to hold lots for the applicant unless such cash payment is made therewith." This was signed by the defendant on the 12th October, 1907, but the $20 was not paid. On the 29th October, 1907, the company wrote to the defendant acknowledging receipt of his application, and stating that "agreements will go forward to you for signature in the course of a few days;" and that the company would draw on the defendant for $30, "balance of first payment." This letter was relied upon by the plaintiff, who, as the company's assignee, sued for the balance of the purchase-price of the lots, as an acceptance of the offer:—

*Held*, in view of the non-compliance with the condition as to cash payment, that the letter was not an acceptance; and a contract was not made out, the full cash payment never having been made, and the company never having waived the condition.

Judgment of the Judge of the District Court of Regina reversed.

*Held*, also, that marking a document for identification, upon an examination for discovery or at the trial, does not make it evidence; and the letter of the 29th October was not, strictly speaking, before the Court as evidence at all; but, as counsel for both parties conducted the case at the trial on the assumption that the letter was put in evidence, and made no objection at the trial that it was not properly put in, neither party could be heard in appeal to say that it was not before the Court.

Appeal by the defendant from the judgment of the Judge of the District Court of Regina, in favour of the plaintiff, in an action to recover a balance of the purchase-price of land.

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The appeal was heard by WETMORE, C.J., NEWLANDS, JOHNSTONE, LAMONT, and BROWN, JJ.

F. L. Bastedo, for the defendant,

P. H. Gordon, for the plaintiff.

The judgment of the Court was delivered by

LAMONT, J.:—This is an action for the balance of the purchase-price of lots 6 to 10, inclusive, in block 14 in the town-site of Reliance. On the 12th October, 1907, the defendant made an application to the Imperial Development Company, through their agent, Samuel Couch, to purchase the said lots, which application was as follows:—

"Imperial Development Co., Limited.
"Empire Block 254 Main St., Winnipeg.
"Application for Purchase.

"This application is made subject to the following conditions:—

"1. Applicant should be particular to give full name, address, and occupation, as the contracts will be made out from this form.

"2. If the applicant does not receive acknowledgement from head office of amount forwarded within ten days from date of sending, we should be notified immediately.

"3. No application will be considered by the vendors unless properly signed by the applicant and accompanied by the cash payment mentioned below, nor will the vendors guarantee to hold lots for applicant unless such cash payment is made therewith.

"The company does not hold itself responsible for promises made by its agents outside of the conditions herein contained.

"Qu'Appelle, Oct. 12th, 1907.

"Imperial Development Co. Limited,
"354 Main Street, Winnipeg, Man.

"Gentlemen: I hereby offer to purchase, subject to the above conditions, 5 lots in the town-site of Reliance, town-site subdivision, legal description of the lots so applied for being lots Nos. 6-7-8-9-10 in block No. 14, at or for the price of $40 each, and enclose herewith $20 to be applied as deposit on first payment of $50 on purchase. I agree to pay the balance as follows: six and twelve months with interest

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at 6 per cent. payable with the said several instalments of principal on all unpaid amounts, and to execute the usual contracts of the company.

"If for any reason this contract cannot be accepted, please advise me of the fact and return the amount remitted, or hold it pending my further instructions.

"$20.00 Oct. 12th, 1907 ..... Applicant.
name in full

"Received on account of this
application subject to conditions Farmer ....occupation.
set forth in same
$20.00 dollars J. W. Ramsay Address.

"Memo. $20.00 deposit on 1st payment of $50.00
Imperial Development Co. Ltd
per Samuel Couch."

This application to purchase, the plaintiff stated in his particulars of claim, was accepted by the Imperial Development Company by letter dated the 29th October, 1907. By an assignment in writing, bearing date the 5th August, 1910, and indorsed on the above application, the said company assigned to the plaintiff all their interest "in the within-written instrument and every covenant, article, or thing therein contained."

The defendant disputes the plaintiff's right to recover on two grounds: (1) on the ground that his application to purchase was never accepted by the Imperial Development Company; and (2), if it was accepted, the said company was a foreign company not registered under the Foreign Companies Act; and that, therefore, neither the company itself nor its assignee had any status to maintain the action.

The action came on for hearing before the Judge of the District Court of the Judicial District of Regina, who gave judgment for the plaintiff. From that judgment the defendant now appeals to this Court.

At the trial no oral testimony was given for either party. All the evidence put in is set forth in the learned Judge's notes as follows:—

"P. H. Gordon, for plaintiff.

"A. D. Dickson, for defendant.

"Mr. Dickson puts in four plans, making complete plan of town-site in question (exhibits 1, 2, 3, and 4), and elects to go on.

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"Mr. Gordon puts in examination for discovery of the defendant, 1st page, questions 10, 11-17, 158-161, 166-173. Page 15, questions 220-228. Puts in letter of the Imp. Dev. Co., dated 28th March (exhibit A.); and letter dated 6th December, 1907, of Imp. Dev. Co. (exhibit B.)

"Mr. Dickson puts in copy of letter of Dec. 30th, 1907, of Imp. Dev. Co. (exhibit No. 5), and asks that the whole examination of defendant for discovery be read."

In printing the appeal-book, counsel for the defendant set out the entire examination for discovery, with all exhibits and letters therein referred to, and not simply those portions put in evidence at the trial by counsel for the plaintiff. A perusal of the questions and answers of the defendant in his examination, which were put in evidence on behalf of the plaintiff, reveals the fact that the only reference contained therein to the letter of the 29th October, which, the particulars set out, constituted the acceptance of the defendant's offer to purchase, is to be found on p. 15, where a copy of the letter is produced and marked for identification. Marking a letter for identification does not make it evidence. Its only purpose is to put the identity of the document beyond dispute when it is subsequently tendered in evidence. In this case not even the letter itself was marked for identification, but only a copy thereof. On the argument before us, it was contended that the letter, not having been put in evidence on the examination or at the trial, was not before the Court at all. In my opinion, this contention, strictly speaking, is right. The letter not being put in, but being marked for identification only, would not be in evidence. I notice, however, in the learned Judge's notes on the argument before him, that Mr. Dickson argued that the letter of the 29th October was not an acceptance, while Mr. Gordon argued that it was. No question is raised as to its not being in evidence. Counsel for both parties evidently treated it as in evidence, and advanced an argument which could only be made on the assumption that the letter formed part of the evidence before the Court. Besides, it was stated to us on the argument in appeal that there was an agreement between Mr. Gordon and Mr. Dickson at the trial that the copy should be used as the original, the original having been sent to Winnipeg for the purpose of being used on an examination of witnesses under a commission, which evidence was to be used at the trial. Where both parties to an action

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conduct their case before the trial Judge on the assumption that a certain document was put in evidence, and make no objection before him that it was not properly put in, I am of opinion that they cannot be heard in appeal to say that it was not before the Court.

Considering, then, that the letter is in evidence, the next question is: Does it constitute an acceptance of the defendant's offer sufficient to form a binding contract? I am of opinion that it does not. The letter is in the following language:—

"October 29th, 1907.

"J. W. Ramsay, Esq., Qu'Appelle, Sask.

"Dear Sir: We beg to asknowledge receipt of your application for five lots in the town-site of Reliance, through our Mr. Couch, for which we thank you.

"Agreements will go forward to you for signature in the course of a few days, as, owing to exceptionally heavy sales of this property, we have been somewhat overworked, hence delay. We will, however, have your papers forwarded to you as soon as possible, which kindly sign, having your signature witnessed, and return one copy to us.

"We are sure that you will be satisfied with your investment, and we hope that our business transactions are only commencing. As per request of Mr. Couch, we are making sight draft on you for $30.00, balance of first payment, which we hope you will see fit to protect at your convenience.

"Sincerely yours,
"Imperial Development Company Limited."

To my mind, this letter contains merely an acknowledgment of the receipt of the defendant's application, an intimation that agreements will be forwarded to the defendant for signature, and a further intimation that the company are drawing on the defendant for the balance of the first payment. If the application had not been made subject to the express condition that no application would be considered by the vendor unless accompanied by the cash payment, there might be ground for argument that an acceptance could be spelled out of the letter of the 29th October—that the intimation that agreements were being forwarded necessarily implied acceptance on the part of the company. But, where the application contains the stipulation that the vendors will not consider it unless accompanied by the cash payment,

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and the cash payment does not accompany it, there must be found, it seems to me, in the letter constituting an acceptance language which leaves no room for doubt that the vendors were accepting the offer without a compliance with that condition. The condition is in their favour, and may be waived by them; but I cannot find in the letter of the 29th October anything to indicate that the company were willing to enter into the contract except on the basis of the full cash payment being made. They evidently expected that the deal would go through; but they do not, to my mind, put themselves in the position of being bound or of being willing to be bound without the cash payment being made. If the defendant had brought an action for specific performance of a contract alleged to have been made by virtue of his application and the letter of the 29th October, and the company had set up that the condition referred to had not been complied with and had not been waived, I can see nothing in their letter which would justify the Court in holding that they were bound to convey. The full cash payment was never made; and, so far as I can see, the company never waived the condition.

The appeal, in my opinion, should be allowed, the judgment of the trial Judge reversed, and judgment entered for the defendant with costs.

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## SASKATCHEWAN.

MARCH 9TH, 1912.

SUPREME COURT EN BANC.

## REX v. HOO SAM.

*Criminal Law—Murder—Evidence—Admissibility — Statements of Prisoner—Persons in Authority—Absence of Warning — Voluntary Statements — Absence of Threats or Inducements — Judge's Charge — Objections to — Absence of Prejudice—Right of Judge to Express Opinion on Facts—Criminal Code, sec. 1019.*

**Three Chinamen were partners in business. One of them, the prisoner, believed that the other two had robbed him. The prisoner and one of the others left their place of business, and the third one deposed that, soon after that, he heard the report of a pistol, and,**

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looking out, saw the prisoner coming towards him (the witness) with a revolver in his hand. The witness ran out of the house, and the prisoner pursued him and fired several shots, one or more of which wounded the witness. The prisoner was then caught and held by some citizens, and the revolver taken from him. The third Chinaman was found dead, from a wound inflicted by a pistol bullet. Two policemen took the prisoner into custody and conveyed him to the police station, and on the way he made a statement, deposed to by one of the policemen at the trial, to the effect that he (the prisoner) had shot two Chinamen. No warning or caution had been given to the prisoner before he made the statement; but the policeman swore that he did not offer any inducement or make any threat, nor did any one, before the statement was made, and that the statement was made voluntarily—that they (the policemen) tried to stop him, they told him to be quiet:—

*Held*, that the statement or confession was properly admitted in evidence, not having been made in answer to questions.

Another Chinaman testified to another confession made by the prisoner in the office of the Chief Police, and in his presence, while the prisoner was under arrest. No one else in authority was present. The statement was made in the Chinese language, and there was no evidence that the Chief heard or understood it. There was evidence that no warning was given, and also that no inducement was offered or threat made:—

*Held*, that this confession also was properly admitted in evidence, when deposed to by the Chinaman to whom it was made.

*Semble*, that the objections to the reception of the evidence as to both confessions not having been raised when the evidence was tendered, it was not open to the prisoner to raise them after verdict.

*Held*, also, that the trial Judge's charge was not objectionable because he, in some of his remarks, referred to the prisoner's statement to the policemen as a "confession;" nor because he pointed out to the jury that they could infer that the prisoner shot the deceased with murderous intent because he had pursued his other partner with murderous intent; nor because he assumed that the prisoner pursued his other partner with murderous intent; nor because he stated that the prisoner was fortunately stopped, "otherwise another man would have been murdered." The jury were not misled by any of these remarks, in view of other portions of the charge.

*Per* WETMORE, C.J.:—A Judge has a right to express his opinion on a question of fact in charging the jury.

*Per* LAMONT, J.:—Whether the trial Judge's direction to the jury was or was not strictly justified in the circumstances of the case, there was no ground for setting aside the conviction, having regard to the provisions of sec. 1019 of the Criminal Code.

*Allen* v. *The King*, 18 Can. Crim. Cas. 1, followed.

Crown case reserved by BROWN, J., upon an indictment and conviction of the prisoner for murder.

The case was heard by WETMORE, C.J., NEWLANDS, JOHNSTONE, and LAMONT, JJ.

C. E. Gregory, for the prisoner.

Alexander Ross, for the Crown.

WETMORE, C.J.:—The accused, Hoo Sam, who is a Chinaman, was charged with the murder of one Mark Yuen, also a Chinaman, and was tried at Prince Albert by Brown, J.,

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with a jury, and convicted of the offence as so charged. The learned Judge has stated a case for the opinion of this Court, which he has signed, but he has attached thereto a transcription of the official reporter's notes of the evidence and of the Judge's charge to the jury and also the Judge's notes of the application for a reserved case and of his remarks in granting the same. Consequently, the stated case consists of all that material. I notice that in one or two particulars the case signed by the learned Judge and the reporter's transcription are not quite in accord with each other. I may have occasion to draw more particular attention to this hereafter.

Hoo Sam, Mark Yuen, and one Mark Yen, were partners, carrying on a restaurant business in Prince Albert. Some time between 5.30 and 6 p.m. on the 26th August, these persons were in the kitchen of the café; and Hoo Sam and Mark Yuen went out. Whether they went together or not, is not very clear: at any rate they disappeared. Shortly afterwards, Mark Yen heard the report of a gun. He went and looked out of the back door (the kitchen door), and he saw Hoo Sam coming towards him at a quick walk with a revolver in his hand, and looking angry. as he expressed it. He (Mark Yen) turned and ran towards the front of the café, Hoo Sam running after him and firing at him with the revolver. He ran out of the front door on to the street; he then ran around a waggon and back into the café through the front door, and through the café to the kitchen door, and out of that door to a yard, and through that to a lane, and thence to another street, and along that street, Hoo Sam pursuing all the time and firing at him with the revolver. Hoo Sam was then caught and held by some of the citizens, and the revolver taken away from him. As Mark Yen came along the lane, as I have stated, he saw Mark Yuen or his body lying on the ground. Mark Yen was very seriously wounded by Hoo Sam on this occasion, so much so that he had to be taken to the hospital, and had not recovered from the effects of it at the time of the trial, which commenced on the 28th November. Shortly after the capture of Hoo Sam, as stated, Mark Yuen was found dead or dying in this lane. The wound that caused his death was inflicted by a pistol bullet. When found, fresh blood was issuing from his mouth. The body moved—whether from muscular con-



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traction or because he was yet living is not very clear; but, if he was not dead when first seen, he died almost immediately afterwards—very shortly after Hoo Sam was captured and the pistol taken from him. Shee and Brooks, two members of the North-West Mounted Police, came along and took him in custody; and, while on the way to the police station, he made the following remarks: "Sons of bitches—shooting two Chinamen—stole my money." Brooks was called as a witness, and testified to the making of these remarks. He also swore that Hoo Sam made use of the word "girl," and that "the remarks were made in broken, disjointed sentences." No warning or caution had been given by Brooks or any person else before these remarks were made, but Brooks swore that "he did not offer any inducement or hold out any inducement or make any threat, nor did any one else, before he made the remarks;" and he also swore that Hoo Sam "made the remarks voluntarily," and that they tried to stop him, they told him to be quiet.

The first question submitted by the learned Judge is, whether this evidence of Brooks is objectionable. The only objection raised to it was, that, Brooks being a constable, and the statement having been made after arrest, no warning or caution was given the prisoner before it was made. I know of no general rule of evidence in criminal cases to the effect that a confession made to a constable or peace officer by a prisoner under arrest is not admissible in evidence, merely because a warning was not given before it was made. There are cases which go to shew that a confession made to a peace officer by a person under arrest in answer to questions put by him will not be received in evidence unless a warning has been previously given. Where, as in this case, the confession is entirely voluntary, without inducement or threat of any sort, and without any questions having been asked, I am very clearly of the opinion that it was properly admitted. This holding is not at variance with what was laid down by Duff, J., in The King v. Kay, 9 Can. Crim. Cas. 403.

In Rogers v. Hawken, 67 L. J. Q. B. 526, Lord Russell of Killowen, at p. 527, commenting on the judgment of Cave, J., in Regina v. Male, 17 Cox. C. C. 689, states as follows: "I should like to say that the observations made by Mr. Justice Cave in that case were perfectly just, but that they must not be taken to lay down the proposition that a state-

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ment of the accused made to a police constable without threat or inducement is not in point of law admissible."

I desire to draw attention to the fact that no objection was raised to this testimony at the time it was tendered or at any time during the progress of the trial. I gather this from the transcription of the reporter's notes. He seems to have been careful to note when any objection was raised to the admission of evidence; but no objection is noted to the reception of the testimony now under consideration. It seems to have been raised for the first time after the verdict was entered.

One Pon Yin, also a Chinaman, was called as a witness, and he testified to another confession by Hoo Sam. It is important to note the circumstances under which this evidence was received, and how the questions reserved by the case as to its reception were raised. The objections to it are: (1) that the Crown did not shew that no inducement or threat was held out to the accused; (2) that no warning was given as to the consequences of making a confession. "This conversation took place in the office of the Chief of Police, while the accused was under arrest; and the Chief of Police was in the office at least part of the time during the conversation, but took no part in it. The parties conversed in the Chinese language, and neither Pon Yin nor the Chinaman accompanying him was a person in authority." I have extracted what I have just set down from the case as stated by the learned Judge. This is one of the instances I have referred to where there is a difference between what appears in the reporter's notes and the formal case as stated by the Judge. In the first place, I cannot find from the reporter's notes that it affiirmatively appears that the Chief of Police took no part in the conversation. Pon Yin states what took place on that occasion, but he does not state that the Chief of Police took any part in what took place. Again, the reporter's notes do not shew that the conversation between the Chinamen was in Chinese. Those notes are to the effect that the first question was put to Hoo Sam by Pon Yin in English, and that the prisoner's answer to that question was in Chinese; but there is nothing in those notes to shew in what language the rest of the conversation was carried on. As a matter of fact, the confession put in was in answer to questions by Chung Ho, Pon Yin's companion. I am of opinion, however, that we must

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accept the learned Judge's statement of the case. Pon Yin testified that he said to the prisoner in English, "Hoo Sam, how are you, poor old man?" and he answered in Chinese. It does not appear what his answer was. Pon Yin also testified that, before he talked to him, he did not say anything to him to induce him to make any statement about his trouble, and that he made no threat to him. He also testified that he did not think that Chung Ho said anything to induce him to make any statement; that, after he (Pon Yin) had made the remark before referred to, he said to the prisoner, "Poor old man," and then Chung Ho said, "What make you do that, you age man?" to which Hoo Sam replied, making the confession which I am now considering. When a question was put in the first instance with a view of putting this confession in evidence, counsel for the prisoner objected on the ground that if it was intended to give evidence of any statement or confession made by the prisoner, the Crown should first lay a foundation for it. The Crown Prosecutor then proceeded to do so, and asked several questions with that object, when counsel for the prisoner intervened, as he had a right to do, and cross-examined the witness, clearly with a view of ascertaining whether the confession was admissible. It could not at that stage have been for any other purpose. When he had finished, the Crown Prosecutor proceeded to offer the confession in evidence, and it was put in without any objection whatever being taken at that stage. I assume, therefore, that not only was the Judge satisfied that a proper foundation was laid for its reception, but that counsel for the prisoner must also have been satisfied. I am of opinion that, under such circumstances, it is not open to him to set up, after verdict, that it was improperly received. Moreover, after the testimony had been given, the Judge put this question to the witness: "What did the other boy (Chung Ho) say before Hoo Sam gave that answer? You stated that the other boy said something before the accused spoke. What did the other boy say?" Answer: "He said, 'You don't do that, you shouldn't do that, a man of your age'—or something like that." The Chief of Police took no part in the conversation. That is, as I have before stated, set out in the case signed by the Judge. The Chief of Police was not called to testify as to what took place on the occasion in question. Chung Ho was not called at all, and no other per-

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son was present except Pon Yin. There was at least prima facie evidence that everything that was said by either of those men on that occasion was proved; and, nothing having been proved to the contrary, the Judge was warranted in being satisfied that no inducement or threat was held out. No formula is necessary to be used to prove the want of inducement or threat. I am of opinion, therefore, that this objection cannot prevail.

Then as to the other objection, I have the same remark to make with respect to this objection, namely, that it was not raised until after verdict. However, I cannot find it laid down anywhere that a confession made to one not in authority, in the presence of a person in authority, must be preceded by a warning. This objection cannot prevail, either.

Objections are also raised to the learned Judge's charge. In referring to the statements made by the prisoner to Brooks, sometimes he mentioned it as a statement, sometimes as a confession. The Judge drew the attention of the jury to the statement made to Brooks, and directed them: "It is for you to say what interpretation is to be put upon the statement of the accused to constable Brooks; it is for you to put a reasonable interpretation on it, taking into consideration all the circumstances surrounding that particular statement." It seems to me to be idle, after that, to contend that, because he afterwards called the statement a "confession," it could have misled or prejudiced the minds of the jury. I may say that I find that in all the works on the law relating to crimes an "admission" is almost invariably called a "confession."

Objections are also raised to the charge: (a) because the learned Judge pointed out to the jury that they could infer that the prisoner shot the deceased with murderous intent because he had pursued Mark Yen along the street with murderous intent; (b) because the learned Judge assumed that the prisoner pursued Mark Yen with murderous intent; that this was a matter entirely for the jury; (c) because the learned Judge stated that the prisoner was fortunately stopped by Mr. Frank, otherwise another man would have been murdered; thereby assuming that the deceased man was murdered—a matter entirely for the jury.

What took place is as follows. The learned Judge stated to the jury that it was their duty to decide on the facts;

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he told them what constituted murder; he left to the jury the question whether Mark Yuen was dead, how he died, if from the wound found on him, who inflicted that wound, and the intent with which it was inflicted. I have described in an earlier part of the judgment the testimony given by Mark Yen, and the manner in which he was pursued and fired at by the prisoner. (No question is raised by this case as to the admissibility of the testimony.) I am of opinion that it was admissible as part of the res gestæ. The matters affecting Mark Yuen, the deceased, and those affecting Mark Yen, were so mixed one with the other that they formed one transaction. The learned Judge, first leaving the question of Mark Yen's credibility to the jury, pointed out what he had sworn to in this respect, and said: "He chased him with the determination of murder. It seems to me, gentlemen, that is the only inference you can draw. He is not satisfied with wounding him, with hitting him, once, but he fires several shots at him, and continues this shooting process until he is fortunately stopped by Mr. Frank. I say, 'fortunately stopped by Mr. Frank,' otherwise another man would have been murdered." I think it would have been better if the Judge had not assumed that the prisoner was pursuing Mark Yen with murderous intent; but, as stated, the question of Mark Yen's credibility was left to the jury, and if Mark Yen told the truth there can be no doubt in the mind of any reasonable man that the prisoner was pursuing him with the determination of murder, or, in other words, with murderous intent. Under such circumstances, I cannot bring my mind to the conclusion that the jury were misled; that they might have believed that the Judge had settled that question, and that it was not for them, especially as they had been told that all questions of fact were to be found by them, and what constituted murder had been defined. As to the assumption that the deceased had been murdered, I am quite assured that the jury were not misled thereby, in view of what they were told they must find in order to bring in a verdict of guilty.

I am by no means satisfied that a Judge has not a right to express his opinion on a question of fact in charging a jury. It was quite customary, when I was practising at the Bar, for very eminent Judges to do so. I am very much impressed with the remarks of Sir James F. Stephens, copied into Crankshaw's Criminal Code, at p. 1003, which are as

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follows: "I think that a Judge who merely states to the jury certain propositions of law and then reads over his notes does not discharge his duty . . . I think that he ought not to conceal his opinion from the jury, nor do I see how it is possible for him to do so if he arranges the evidence in the order in which it strikes his mind . . . The act of stating for the jury the questions which they have to answer, and of stating the evidence bearing on those questions, and shewing in what respect it is important, generally goes a considerable way towards suggesting an answer to them, and if a Judge does not do as much at least as this, he does almost nothing." And in this connection I draw attention to the remarks of Moss, C.J.O., in Rex v. Ventricini, 17 Can. Crim. Cas. at pp. 187 and 188.

It is further urged that the learned Judge was in error as to the first alleged ground of misdirection, because the jury would have no right to infer that the prisoner shot the deceased with murderous intent because he pursued Mark Yen with murderous intent, because they were separate transactions. I am of opinion that they would have such right. I have stated that it was practically all one transaction. Assuming that the prisoner inflicted the wound on the deceased, his conduct while this transaction was being carried on would be an important element in deciding with what intent he shot the deceased. This, I take it, is in accordance with what was laid down in Makin v. Attorney-General for New South Wales, [1894] A. C. 57. It will be observed, from the reporter's copy of the charge, that the learned Judge, at the stage of making this direction, was dealing with the question of the motive in shooting Mark Yuen, not with the question of shooting him.

All the questions submitted by the learned Judge should be answered in the negative, the conviction affirmed, and the sentence carried out.

NEWLANDS, J.:—As to the evidence of Brooks, who was a police constable, I am of opinion that it was proved by affirmative evidence that it was free and voluntary. In reply to Mr. Ross, the Crown counsel, who asked Brooks, "Did you speak to him or ask him any question or in any way make any remarks to him?" he answered, "I told him to be quiet—that was all." And, in reply to the question put to him by the learned trial Judge, "At the time the prisoner

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made this statement to you after his arrest, on the way to the police station, did you offer any inducement, or hold out any inducement, or make any threat, or did any one else, before he made that statement?" Brooks answered: "No, my Lord. He made that voluntarily, and we tried to stop him. We told him to be quiet." In the case of a constable or other person in authority, where the confession is not given in answer to questions after the arrest of the prisoner, I think that all the law requires is for the Crown to prove affirmatively that the confession was free and voluntary before the same is admissible in evidence, and they have done so in this case. It was argued by Mr. Gregory that the Crown should go further than this, and prove that the prisoner was warned, before the evidence was admissible; and he cited in support of this proposition The King v. Trepanier, decided in the Court of Appeal, Quebec, on the 5th December last, and not yet reported. In the judgment of the Court, delivered by Mr. Justice Trenholme, that learned Judge said: "The English decisions on this subject of confession appear very conflicting, and are not a sure guide for us. The decisions of our own Courts assist us. It appears to be well established that evidence of a confession such as that alleged in this case ought not to be admitted unless it be first affirmatively shewn that it was freely and voluntarily made, and after proper warning." In that case, the confession was obtained in the following manner: "On the second interview, on Sunday night, McCaskill and Samson (the detectives) took the prisoner into a small room, and there, alone with him, they asked him questions. It is admitted they questioned him with a view to get a confession from him."

That case does not, I think, go any further than The King v. Kay, 9 Can. Crim. Cas. 403, where it was held that after an arrest a confession made to a constable in answer to questions is inadmissible unless the prisoner is first properly warned. The English authorities are to the same effect.

Now, in this case, the statement made by the prisoner in Brooks's presence was not made in answer to questions; and, therefore, the above cases requiring a warning do not apply.

As to the evidence of Pon Yin, neither he nor the other Chinaman was a person in authority. The conversation was in the Chinese language; and, although it took place in the Chief of Police's office, and that officer was present part of

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the time, he took no part in the conversation. There is no evidence that the Chief of Police understood the Chinese language; and there can be no presumption that he did understand it, it being a matter of common knowledge that Chinese is not generally understood by English-speaking people. Now if the Chief did not understand—and his not taking part in the conversation would point to the fact that he did not—he was not present so far as this conversation was concerned, and more than if he had been asleep or so far removed from the parties conversing that he could neither have heard nor taken part in it.

And when, in addition to this, we have evidence of all the conversation that did take place, and thereby evidence that it was free and voluntary, I am of the opinion that the learned trial Judge was right in admitting the same; and would, therefore, answer the first question in the negative.

As to the learned trial Judge's charge, it seems to me that it does not matter whether, in referring to the evidence of Brooks, he called what Brooks testified to a "confession" as well as a "statement." Any statement of the accused which tends to prove his guilt would be a confession; and, if the words used are ambiguous, it would be for the jury to say what was the effect of them; and, as the trial Judge told the jury that it was for them to say what interpretation was to be put on the statement of the accused to constable Brooks, there can be no objection to his referring to it either as a statement or a confession.

As to the second objection, that the trial Judge pointed out to the jury that they could infer that the accused shot the deceased with murderous intent because he had pursued Mark Yen, another Chinaman, along the street with murderous intent, and that such was not a fair inference to ask the jury to draw under the circumstances, I would only say that the Crown would make out their case if they proved that the accused killed Mark Yuen; and that, if there was no evidence which would reduce the killing to manslaughter, or non-culpable homicide, the accused would be guilty of murder; and, there being no such evidence in this case, the trial Judge would have been justified in telling the jury that, if they found that the accused killed Mark Yuen, he was guilty of murder. There could, therefore, be no objection to his remarks about the prisoner's intention being murderous if the evidence proved him guilty of murder.

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These remarks also apply to the other objections taken to the charge. I would, therefore, answer the second question in the negative also.

LAMONT, J.:—I agree with the conclusions reached by the learned Chief Justice and my brother Newlands in their judgments, which I have had the opportunity of reading. The only points which presented any difficulty to my mind were those set out in the second and third objections to the charge of the learned trial Judge stated in the reserved case as follows:—

"Secondly, it is objected that I pointed out to the jury that they could infer that the accused shot the deceased with murderous intent because he had pursued Mark Yen along the street with murderous intent; that such was not a fair inference to ask the jury to draw under the circumstances.

"Thirdly, it is objected that I assumed that the accused pursued Mark Yen with murderous intent, and that I had no right to assume that he did so; that it was entirely a matter for the jury to make such assumption and draw such inference."

From the language used in the first of the above objections, it might be thought that the learned Judge was directing the jury that they might infer that the accused shot Mark Yuen from the fact that he pursued Mark Yen with murderous intent. Such, I take it, was not his intention: for, when dealing with the matter in his charge, he deals with it solely in connection with the question of motive. Besides, it was not contended before us that such was the idea conveyed by the charge. The ground of the objection was, that he told the jury that, if they found that the accused had killed Mark Yuen, they could infer that he did so with murderous intent, because he had pursued Mark Yen with murderous intent. Now, I am not prepared to say that, because the accused pursues and shoots one man (Mark Yen) with murderous intent (assuming that fact to have been established), it is a proper inference to draw from that fact that he killed another man (Mark Yuen) with murderous intent, should it be found that he did kill him. The question before the jury was, whether or not the accused shot Mark Yuen; and, if he did do it, did he do it intending to cause his death or intending to cause to him bodily injury which he knew was likely to cause death and was

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reckless whether death ensued or not. Until the jury found as a fact that it was the accused's bullet that caused the death of Mark Yuen, the question of intention did not arise. When once they reached the conclusion that the accused did shoot and kill Mark Yuen, the question of intention became most material. If nothing appeared in the evidence to indicate the intention with which he shot him, the jury would be justified in inferring an intention to kill from the fact that he fired the fatal shot rather than from the fact that he pursued another man with murderous intent, because, until the contrary is shewn, every person is presumed to intend the natural and probable consequences of his own act. But, whether the learned trial Judge's direction was or was not strictly justified under the circumstances of this case, there is, to my mind, no ground for setting aside the conviction.

Section 1019 of the Criminal Code provides as follows: "1019. No conviction shall be set aside nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial or some misdirection given, unless, in the opinion of the court of appeal, some substantial wrong or miscarriage was thereby occasioned on the trial: Provided that, if the courrt of appeal is of the opinion that any challenge for the defence was improperly disallowed, a new trial shall be granted."

In Allen v. The King, 18 Can. Crim Cas. 1, the Supreme Court of Canada decided that, where evidence has been improperly admitted, or something not according to law has been done at the trial which may have operated prejudicially to the accused upon a material issue, although it has not been and cannot be shewn that it did in fact so operate, the court of appeal may order a new trial. That, being a judgment of the Supreme Court of Canada, is binding upon us, and we must construe sec. 1019 in the light of that decision. But, to come within the principle of that decision, it must appear that the portion of the charge objected to might have operated prejudicially to the accused upon a material issue. In my opinion, the portion of the charge objected to could not have operated on the minds of the jury prejudicially to the accused. The question of intent, as I have already pointed out, could not arise until the jury found that the accused did shoot and kill Mark Yuen. Having found that

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he did so, there was no conclusion that they could arrive at on the evidence other than that he did so with intent to kill. There was no contention at the trial that the killing was accidental. The defence was, that he did not do it. The jury had before them the evidence of Pon Yin as to the statements made by the accused to himself and Chung Ho. These statements were: "I have been here for nine years and all the China boy been in partnership with my money and everything and then go home to China, and here I am not worth a cent and they don't satisfy me and I kill him;" and: "I want to kill them both before and then I kill myself."

From the evidence, the accused was evidently of opinion that both boys had been taking money from his restaurant, and these statements were evidence of what his intentions were when he did the shooting, and they were the only evidence of his intentions, apart from the circumstances of the case, which all pointed in the same direction, from which the jury could infer intent. The jury, in my opinion, would not have been justified on the evidence in coming to any other conclusion than that the killing was intentional. The direction of the learned trial Judge, therefore, even assuming it not to have been strictly justified, did not operate to the prejudice of the accused.

The conviction should be affirmed.

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## SASKATCHEWAN.

MARCH 9TH, 1912.

SUPREME COURT EN BANC.

## SUTHERLAND v. RHINHART.

*Principal and Agent—Agent's Commission on Sale of Land —Agreements—Construction — Option — Finding Purchaser— Quantum Meruit.*

The plaintiff, a land agent, was *held*, not entitled to a commission or remuneration on a quantum meruit basis for finding a purchaser for the defendants for two quarter-sections of land, where his claim was based upon an instrument (A) which was construed as an option for the sale of the land to himself or some one else whom he might procure, and it appeared that he had paid the defendants $25

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**"to bind the bargain"—although as to one of the quarter-sections, which was subsequently sold by one of the defendants to the purchaser found by the plaintiff, by the agreement (instrument B) between the plaintiff and defendants the plaintiff was appointed agent for sale, and was to be allowed a commission. The two instruments were not to be treatea as one, and the plaintiff based his claim on A, which included both quarter-sections.**

**Judgment of MACLEAN, Dist. Ct.J., 19 W. L. R. 819, affirmed.**

Appeal by the plaintiff from the judgment of the Judge of the District Court of Battleford, 19 W. L. R. 819, dismissing the plaintiff's claim for commission on the sale of land for the defendants.

The appeal was heard by WETMORE, C.J., NEWLANDS, JOHNSTONE, LAMONT, and BROWN, JJ.

H. Y. MacDonald, for the plaintiff.

H. C. Lisle, for the defendants.

The judgment of the Court was delivered by

BROWN, J.:—The plaintiff is a real estate man and implement agent, and brought his action inter alia to recover $218.75 by way of commission. This he claims under an agreement in writing bearing date the 24th August, 1909, by which, he alleges, the defendants listed with him for sale the south-east quarter of section 20, township, 49, range 24, and the north-west quarter of section 12, township 49, range 25, all west of the 3rd meridian, together with certain chattels, for $4,375, and agreed to pay the plaintiff five per cent. commission upon his producing a purchaser therefore at the said price. He further sets up that he produced a purchaser for the said lands at the price named who was able and willing to complete the purchase, and that, in consequence, there is due to him the $218.75 as claimed. In the alternative, the plaintiff claims the said amount on a quantum meruit basis.

The plaintiff's claim from either point of view is based upon the alleged fact that he produced a purchaser for the half section who was ready and able to buy for the price and upon the terms set out in the agreement referred to.

The action came on for trial before the Judge of the District Court at Battleford; and, although he allowed the plaintiff's claims as to the other items referred to in the action, he found in favour of the defendants on this claim for commission. From that finding the plaintiff appeals.

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The following agreements were put in evidence by the plaintiff at the trial:—

"Agreement between Owner and Agent.

"(Combination Plat)

"Lashburn, August 24th, 1909.

"Map of S. E. section 20, town. 49, range 24, W. 3.

"(Space filled in with plat shewing 64 sections; 36 sections being numbered 1 to 36 and the rest not numbered).

"Lands listed for sale (or lease).

"Listed by Daniel Rhinhart. Owner's address, Lashburn, Listed 20th Aug., 1909. Legal description shewn above. Acres cultivated, 100. Acres untillable.....acres; timber, nil. Kinds of timber, nil. Acres grass, nil. Acres of marsh or liable to be overflowed, nil. Acres fenced, nil; with fence, nil. Surface, rolling. Soil, black. How watered, good. Crops raised, three.

"Buildings: house 14 x 24, rooms, two, 2 storeys. Material, logs. Built in 1907. Condition.....Barn, size 45 x 30. Material, logs. Built in 1907. Other buildings, nil. Value of buildings, $400.00. Taxes, $10.00. Rental value.....Insurance, nil. Nearest R.R.....

"And we the undersigned will take for the N. W. 12-49-25, west 3, and the S. E. 20-49-24, west 3, $4,375.00, with all goods thereon and further agree to accept $2,500.00 cash as soon as money comes from the east, not later than thirty days from date of this agreement, and the balance $1,875.00 on the first day of July, 1910. And we further agree to cut and shock said grain, which is about 75 acres in the stook, and turn over all hay now put up on said S. E. 20-49-25 W. 3rd, and all other articles not mentioned here, for the said sum, for which we accept this day $25.00 to close said deal. And we further agree to look after all stock and chattels in the same way as at the present time until the full sum of $2,500.00 is paid us in cash.

"Daniel Rhinhart (L.S.)
"C. C. Rhinhart" (L.S.)

"Agreement between Owner and Agent.

"(Combination Plat)

"Lashburn, Aug. 24, '09.

"Map of N. W. section 12, town, 49, range 25, W. 3.

"(Space filled in with plat shewing 64 sections; 36 sections being numbered 1 to 36 and the balance not numbered).

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"Lands listed for sale (or lease). Listed by George Rhinhart. Owner's address, Lashburn. Listed, Aug. 20th, 1909. Legal description shewn above. Acres cultivated 100. Acres untillable, 60. Acres timber, nil. Kinds of timber, nil. Acres of grass, nil. Soil, black loam. How watered, natural. Crops raised, 4.

"Buildings: House 16 x 20, rooms, one storey. Material, logs. Built in 1907. Condition, good. Barn, size 16 x 32. Material, logs. Built in 1909. Other buildings, granary. Value of buildings.....Taxes, nil. Rental value .....Insurance, nil. Nearest R.R. point..... Title patented. Incumbrance, seed grain 1908, about $45.00. Price.....Terms, $1,500.00, Cash. Balance, spring, 1910. Exclusive sale N.W. 12-49-25, W. 3rd. Option until the— Cash paid for option, $25.00.

"I hereby appoint A. W. Sutherland my exclusive agents for the sale of the above described property until the said moneys at the above price and on above terms; and if sale is made by them I agree to allow them a commission of five per cent. on selling price.

"I further will give with the above land,—2 sets harness, two saddles, good, (1) scraper, 3 grown hogs, and five little ones. 50 chickens, one waggon, two ploughs, walking, 1 sleigh, 1 mower, 1 hay rake, full set of barn tools, set drag harrows, 1 grindstone, crowbar, two shovels, 3 axes, two spades, two hay racks, one waggon box, 1 steer called Foster, 3 years, (2) steer with ring in nose, (1) steer one year, four 1 year heifers, two 1 year old steers, (3) 2 yr. steers, (12) four years cows, (8) calves, (1) bull, (1) grey gelding, 4 yr. (1) grey mare 5 yr. old, (1) bay mare 6 yr. (1) bay gelding 2 yr. (1) 1 yr. bay filly, one black pony.

"D. Rhinhart (L.S.)
"G. C. Rhinhart" (L.S.)

It appears that these agreements, which I shall refer to as agreements A and B, respectively, were executed by the defendants at the same time, and left with the plaintiff; and it is by virtue of them, and solely by virtue of them, that the plaintiff was justified in purchasing or finding a purchaser for the said land or any part thereof. At the time of the execution of these documents, the plaintiff says he paid the defendants $25 "to bind the bargain." The plaintiff in his evidence sets up that he, within thirty days of the execution of the agreements, found a purchaser, William

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G. Lamb, who was prepared to buy the half section on the terms set out in agreement A; that he took Lamb out to see the place: that he had a document which he describes as a bill of sale ready for the defendants to sign; and that he requested the defendants to sign the same, stating that the cash payment, $2,500, was in the bank. He says that the defendants refused to sign the document, giving as their reason that the wife of Daniel Rhinhart had an interest in the stock, and that she would not part with it. The plaintiff did not tender any money, nor did he pretend to have any money with him; but, according to his version, the money was ready at the bank, and he so informed the defendants. Daniel Rhinhart's version of what took place is, that he told the plaintiff he would sign the document if they had the money, and that his wife, in a letter written from Lethbridge to him, instructed him not to turn over the property till he got the money. The trial Judge did not make any finding as to which of these versions was correct; and, in my view of the case, it is not necessary that this Court should do so. No contract for the half-section was entered into; but the evidence shews that subsequently (there is nothing to shew just when) Lamb purchased the north-west quarter of section 12 from George C. Rhinhart. Assuming the plaintiff's version of what took place to be correct, I do not see how he can recover in this action. As I have already indicated, he has based his claim on agreement A and work done in pursuance thereof. Now agreement A, as I understand it, is an option to the plaintiff, or at most an option to the plaintiff or any one else whom he might find, to purchase the property within thirty days on the terms mentioned therein, and this must have been the way the plaintiff understood it, because, as he says himself, he paid $25. to bind the bargain. If it were a mere listing, why should he pay $25., and, as he says, "to bind the bargain?" It is not contemplated by that document that, in the event of the plaintiff taking up the option or finding a person ready to take up the option, the defendants shall pay the plaintiff a commission therefor, either on a quantum meruit basis or otherwise. In the event of the plaintiff taking up the option himself, he would get the land; and, if he turned his option over to some one else, he would be expected to look to that person for his remuneration. An attempt was made on the part of counsel for the plaintiff to treat agreement A and B

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as one and the same document. To me they appear quite distinct. Agreement A includes both quarter-sections, and settles the terms on which the two quarter sections are offered for sale together. Agreement B, on the other hand, deals solely with the one quarter-section. It is the land contained in this latter agreement that Lamb subsequently bought; and, had the plaintiff based his action on this agreement, it is just possible that he would have been entitled to a commission as being the causa causans of this sale to Lamb. I, however, express no opinion on that point, as it is not necessary to do so for the disposition of this case.

For the reasons given, I am of opinion that the appeal should be dismissed, and with costs.

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## SASKATCHEWAN.

MARCH 9TH, 1912.

SUPREME COURT EN BANC.

## REX v. LESCHINSKI.

*Liquor License Act—Sale in Prohibited Hours—R. S. Sask. 1909 ch. 130, secs. 65, 83, 110—Sales to two Persons at Same Time—Separate Sales—Distinct Offences — Liability to two Penalties.*

The defendant, having a license for the sale of intoxicating liquors upon his hotel premises, sold liquor during prohibited hours to two men, who gave separate orders at the same time, each paying separately for what he ordered:—

*Held*, having regard to the provisions of secs. 65, 83, and 110 of the Liquor License Act, R. S. Sask. 1909 ch. 130, that there were two sales; and the defendant could be convicted of two offences and be subjected to two penalties—every sale made contrary to the provisions of sec. 65 is to be regarded as a separate offence and visited by the penalty prescribed in sec. 83.

Review of the authorities.

Case stated by a Police Magistrate, at the instance of the complainant, Charles A. Mahoney, upon a dismissal of a complaint against the defendant, Simon Leschinski, for an offence against the Liquor License Act.

The case was heard by WETMORE, C.J., NEWLANDS, JOHNSTONE, LAMONT, and BROWN, JJ.

Alexander Ross, for the complainant.

J. F. Bryant, for the defendant.



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The judgment of the Court was delivered by

BROWN, J.:—The defendant was charged before William Trant, Esquire, a Police Magistrate, "for that he, the said Simon Leschinski, at the city of Regina, on the 2nd day of December, 1911, in his premises, being a place where liquor may be sold, to wit, the Royal Hotel, unlawfully did sell liquor to one Max M. Lenhoff, during the time prohibited by the Liquor License Act for the sale of the same, without any requisition for medical purposes, as required by the Act, being produced by the vendee or his agent;" and the charge was tried and determined by Mr. Trant on the 18th December, 1911.

The evidence shews that on the 2nd December, which was a Saturday, between the hours of seven-thirty and nine o'clock in the afternoon, Lenhoff and one Collinson went to the defendant's hotel, being licensed premises, and that, upon Collinson asking one Wilson, the bar-tender of the hotel, what chance there was of getting a drink, they were shewn by him to a room upstairs. Wilson there asked each man what he would have, and they both gave orders. Collinson ordered a bottle of whisky, and Lenhoff a bottle of whisky and also a bottle of beer. The one order followed the other almost immediately, and each at the time of giving the order paid Wilson for what each respectively ordered. Wilson, upon getting the order and the money, left the room and soon returned with Collinson's bottle of whisky and Lenhoff's bottle of beer. Lenhoff's bottle of whisky was subsequently delivered to him downstairs by Wilson, and the evidence shews that Wilson went into the bar and got this last bottle at eight-fifty o'clock p.m., and the defendant was seen to open the bar a few minutes before Wilson got the same; in fact, the evidence shews that the defendant was aware of all that was taking place. The bottles of beer and whisky which were delivered in the room were opened and part of the contents drunk there by Lenhoff and Collinson.

The defendant was convicted of the sale to Collinson; but, upon hearing the evidence in this case, the magistrate dismissed the charge, being of opinion that the sales to Lenhoff and Collinson constituted but one offence. At the request of the complainant, the magistrate has stated a case, under sec. 761 of the Criminal Code, for the opinion of this Court.

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Counsel for the defendant supports the order of the magistrate on two grounds: firstly, that the sales to the two men constituted one transaction, and were in reality one sale to the two men; secondly, assuming that there are two sales, the defendant is liable to only one penalty, as the two sales were made on the same day, and the Act does not contemplate that the penalty provided by it should follow each separate sale made on the same day.

The sections of the Liquor License Act, being R. S. Sask. 1909 ch. 130, that bear on the matter are, 65, 83, and 110. By sub-sec. 1 of sec. 65 it is enacted that "in all places where intoxicating liquors are licensed to be sold by retail, no sale or other disposal of liquors shall take place therein or on the premises thereof or out of or from the same to any person or persons whomsoever save as hereinafter provided from or after the hour of seven of the clock on Saturday night till seven of the clock on Monday morning thereafter." This sub-section then goes on to make similar provisions as to wholesale premises, and finally provides that no liquor, whether sold or not, shall be permitted to be drunk on the premises during prohibited hours. By sub-sec. 2 of sec. 65 the sale of liquors is prohibited on certain other days of the year. By sub-sec. 4 of sec. 65 it is provided that no bar-room shall be kept open at any time during prohibited hours. Sections 83 and 110 are respectively as follows:—

"83. Violation of any of the provisions of sub-sections (1), (2) and (4) of section 65 hereof shall be an offence for which the person violating shall be liable on summary conviction:—

"1. For the first offence to a penalty of not less than $50 nor more than $100 and in default of payment forthwith after conviction to not less than two months' nor more than four months' imprisonment;

"2. For the second or any subsequent offence to a penalty of not less than $100 nor more than $200 with absolute forfeiture of license and in default of payment forthwith after conviction to not less than four months' nor more than six months' imprisonment with absolute forfeiture of license or to imprisonment for not less than one month nor more than six months with absolute forfeiture of license or to both fine and imprisonment with absolute forfeiture of license."

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"110. Convictions for several offences may be made under this Act although such offences may have been committed on the same day; but the increased penalty or punishment hereinbefore imposed shall only be incurred or awarded in the case of offences committed on different days and after information laid for a first offence."

With reference to the first contention, the evidence shews that each man gave his separate order and paid for the same. It was done at practically the same time; nevertheless, the orders were distinct and separate; and, had delivery taken place after payment, each man could be charged only (assuming that a charge could be made at all) with what he had respectively ordered. No distinction can be made in this respect between the sale of liquors and that of any other commodity. As the orders were separate, and delivery made pursuant to the orders, and each man paid for what he ordered, and, as there was nothing to shew that the two men were to be jointly responsible for the two orders, I am of opinion that the sales to Lenhoff and Collinson were separate and distinct and constituted two separate sales.

As to the second contention, counsel in support thereof cited the cases of Crepps v. Durden, 1 Cowper 640, and Sm. L. C., 11th ed., p. 651; Apothecaries' Co. v. Jones, [1893] 1 Q. B. 89; Regina v. Scott, 33 L. J. M. C. 15; and Rex v. Swallow, 8 T. R. 284. But an examination of these cases shews that the enactments under which they are decided are directed against an habitual or continuous course of conduct and not against an individual act, and it is on that ground that these decisions are based.

The case of Crepps v. Durden is one brought for violation of the Sunday Trading Act, 29 Car. II. ch. 7; and it was there held that a baker who sold a number of hot loaves on the same Sunday could not be convicted of more than one offence. The wording of the Act is as follows: "Whoever shall do or exercise any worldly labour, business or work of their ordinary calling on the Lord's day," etc. Lord Mansfield, in giving judgment, says: "On the construction of the Act of Parliament, the offence is, 'exercising his ordinary trade upon the Lord's day;' and that, without any fractions of a day, hours, or minutes. It is but one entire offence, whether longer or shorter in point of duration; so, whether it consist of one or a number of par-

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ticular acts. The penalty incurred by this offence is five shillings. There is no idea conveyed by the Act itself, that, if a tailor sews on the Lord's day, every stitch he takes is a separate offence; or, if a shoemaker or carpenter work for different customers at different times on the same Sunday, that those are so many separate and distinct offences. There can be but one entire offence on one and the same day; and this is a much stronger case than that which has been alluded to, of killing more hares than one on the same day; killing a single hare is an offence; but the killing ten more in the same day will not multiply the offence, or the penalty imposed by the statute for killing one. Here, repeated offences are not the object which the legislature had in view in making the statute; but simply to punish a man for exercising his ordinary trade and calling on a Sunday."

The case of Apothecaries' Co. v. Jones is of a similar character to the last. It was brought under the Apothecaries' Act, 55 Geo. III. ch. 194, by which it is enacted that, "if any person shall act or practise as an apothecary in any part of England or Wales without having obtained such certificate as aforesaid, every person so offending shall, for every such offence, forfeit and pay the sum of £20." The defendant had prescribed for and supplied medicines to three different patients on three separate occasions on the same day. Baron Pollock, in giving judgment, says: "The question I have to determine is, whether, under these words, the advising and prescribing for these three persons consecutively under the circumstances constitutes three offences or one offence. The words of the Act appear to me to point rather to an habitual or, at all events, a continued course of conduct than to an isolated act as constituting the offence." And further on, referring to the case of Crepps v. Durden, he says: "It appears to me, therefore, to be clear that, however the subject-matter and character of the offences created by the two statutes may differ, they are both directed against an habitual or continuous course of conduct and not against an individual act."

The case of Regina v. Scott was decided on the special wording of the form of conviction which is given in sec. 8 of the statute, 19 Geo. II. ch. 21; and the case of Rex v. Swallow simply decided the point that a defendant should be convicted of several offences in the same conviction, and does not help the respondent in this case.

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On the other hand, the case of Brooke v. Milliken, 3 T. R. 509, was an action brought under the statute 12 Geo. II. ch. 36, which enacts as follows: "It shall not be lawful to import or bring into this kingdom for sale any book, first composed or written and printed and published in this kingdom, and reprinted in any other place whatsoever; and, if any person, knowing the same to be so reprinted and imported, shall sell, publish, or expose to sale, any such book or books, he shall forfeit the said book or books, and the same shall be forthwith damasked, and such offender shall forfeit £5 and double the value of every book which he shall so sell," etc. Two distinct sales on the same day were proved against the defendant, and it was determined by Lord Kenyon that it was the act of sale that was the offence, because he held that "two penalties may be recovered, because they were two distinct acts of sale."

Again, in the case of In re Hartley, 31 L. J. M. C. 232, it was held by Mellor, J., under the Public Health Act, 1848, that "each exposure of a piece of bad meat was a separate offence." I have been unable to see the statute in question in this case, and therefore am not aware of its exact wording.

In every case where several acts are charged to have been committed, it must depend upon the construction of the statute to which they refer, whether distinct penalties are incurred and ought to be awarded for each act, or whether the several acts form but one aggregate offence and require but one penalty: Paley on Convictions, 8th ed., p. 283.

Now, looking at the legislation bearing on this case, it, in my judgment, shews an intention that every sale made contrary to the provisions of sec. 65 should be regarded as a separate offence and visited by the penalty prescribed in sec. 83. The wording is, that "no sale shall take place," and not that "no one shall sell"—indicating that the offence is not in carrying on the usual business of the licensee, but rather that each sale shall constitute an offence in itself. Again, we find in sub-sec. 4 of this same section provision for keeping the bar closed; and, by virtue of sub-secs. 3 and 4, no one is allowed in the bar during the prohibited hours except the licensee, a member of his family, or his employee, and then only during specified hours and behind locked doors, and for the sole purposes of checking

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accounts and cleaning up. These latter sub-sections indicate an intention to prohibit the licensee carrying on his usual business of selling liquors, in contrast to the first sub-section, which indicates an intention to make each and every sale of liquor an offence, whether made in the bar or elsewhere on the licensed premises. And sec. 83, which fixes the penalties, notes the distinction between sub-secs. 1 and 4 of sec. 65, and makes the violation of the provisions of each a separate offence, to be visited with a separate penalty. Again, sec. 110 tends further to confirm this view, because it provides that convictions may be made for several offences, though committed on the same day: and at the same time it protects the licensee from the increased penalty in such cases.

I am, therefore, of opinion that the magistrate was wrong in dismissing this charge, and that his order should be set aside and the matter remitted to him with the opinion of this Court that the dismissal of the complaint was erroneous, and that the defendant ought to have been convicted, and that this magistrate should be directed to convict the defendant of the offence charged, with such penalty as he may deem proper and with or without costs, as he may see fit. The defendant should have his costs of appeal.

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## MANITOBA.

MACDONALD, J. MARCH 11TH, 1912.

TRIAL.

## ARCHDEKIN v. McDONALD.

*Vendor and Purchaser—Contract for Sale of Land—Option or Offer—Revocation before Acceptance—Absence of Consideration—Absence of Seal—Tender—Informality—Insufficiency—Specific Performance Refused.*

In July, 1911, the plaintiffs paid the defendant $5, and she signed a document giving them an option of purchase of her land for 60 days. The price was named, but not the terms of payment. The defendant on the 25th August, 1911, signed a new option for 60 days from that date, at the same price; terms of payment were specified, the amount of cash to be paid being $1,000. In this the defendant acknowledged the receipt of $5, but no sum was at that time paid to the defendant:—

*Held*, that, as there was no consideration for the extension of time given under the second option, and it was not under seal, the defendant could, after the expiration of the time granted by the first option, have revoked the second before its acceptance.

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**On the day before the second option expired, one of the plaintiffs asked the defendant to accept $500 as a cash payment, instead of the $1,000. The defendant said she wanted a $5,000 deposit, instead of $1,000. The plaintiff made no answer to this demand, and nothing more was said:—**

***Held*, that this amounted to a revocation of the option.**

***Held*, also, that the plaintiffs had not complied with the requirements of the option, and were not entitled to enforce specific performance as of a completed agreement. They made a tender on the 24th October, but it was not a proper or legal tender—the amount of the cheque tendered was insufficient, and, though the cheque which the plaintiffs had with them and offered to the defendant was marked, there was no evidence that the defendant saw it, so as to have the opportunity of objecting to it; and she could not, therefore, be said to have waived the making of a proper and legal tender.**

Action for specific performance of an alleged contract for the sale of land by the defendant to the plaintiffs.

R. M. Dennistoun, K.C., and H. N. Baker, for the plaintiffs.

H. A. Burbidge and F. M. Burbidge, for the defendant.

MACDONALD, J.:—The defendant is the owner of certain property in the city of Winnipeg, known as numbers 375 and 377 William avenue. In July, 1911, she gave the plaintiffs an option for 60 days to buy this property, the plaintiffs paying her $5 on such option.

Some time after the giving of this option, the plaintiffs thought it advisable to improve on the option, which they had obtained, by specifying the terms of payment, which were omitted in the first option, and on the 25th August, 1911, they procured the option exhibit 1. The former option would have expired in September, but the second option, being the one under consideration, being taken for 60 days from its date, would not expire until the 24th October. This second option would have the effect of extending the former option.

In this last option the defendant acknowledges the receipt of $5, but it is admitted by the plaintiffs that the $5 were not paid to the defendant; and it is submitted that it was but a re-acknowledgement of the $5 paid at the time of the giving of the first option.

There is no consideration for the extension of time given under the second option, and it is not under seal; the defendant could, then, after the expiration of the time granted by the first option, have revoked the second before its acceptance. Now, the question is, was there such a revocation?

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After the giving of the second option the plaintiffs endeavoured to induce the defendant to change its terms; the plaintiff Austin Archdekin says that on the 3rd October, being one day before the expiration of the 60 days' option, he interviewed her and wanted her to accept $500, instead of the $1,000 payment provided for by the terms of the option, and that finally she got cross and stated that she was tired of it and wanted a $5,000 deposit, instead of the $1,000. The plaintiff made no reply to her demand for this $5,000, and left without anything further being said. The defendant contends that this was a revocation of the option given, or at least a variation of it, which she asserts she had a right to make at any time before acceptance; and it seems to me that, as the plaintiffs were importuning and evidently worrying her for better terms, she was within her rights in withdrawing her offer, which, being without consideration, she had the power to do, and the non-acceptance by the plaintiffs of her variation of the agreement was in effect a revocation by her of the option she had given.

Nor do I think this is the only difficulty in the plaintiffs' way. Even were there no revocation of the option, did the plaintiffs comply with the requirements of the option so as to entitle them to succeed?

"The conditions imposed on the exercise of an option are always strictly construed. All precedent conditions must be fulfilled by the purchaser before the contract for sale binds the vendor. Moreover, time is of the essence of such contracts; hence if the conditions are not complied with by the day fixed the option is lost:" Dart on Vendor and Purchaser, 7th ed., p. 272.

To entitle the plaintiffs to the benefit of the option, they must pay the $1,000 cash within the 60 days. They waited until the very last day, after failing in the meantime to secure better terms, and then called upon the defendant, and told her they had come to close the deal, and said they had a cheque and offered it to her, but could not say if she saw the cheque, to which offer the defendant replied, "Too late, have already sold property," and walked away.

This is not, to my mind, a proper or legal tender, for two reasons: the amount was not sufficient, the cheque being for but $995; and, even were it for $1,000, the manner of tender did not constitute a legal tender; a cheque, even though marked, is not a legal tender. "To constitute a valid

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tender of money, there must, in the absence of some act or condition which amounts to a waiver, be something more than a mere readiness and willingness to pay, even though expressed; there must be an actual production of the money:" 28 Am. & Eng. Encyc. of Law, p. 28. Here there is no evidence that the defendant even saw the cheque, so that she may not have had the opportunity of taking objection to the cheque itself as a legal or proper tender. It is quite possible that she might have rejected the cheque. It was but the day before that the plaintiffs were endeavouring to get easier terms, and the defendant might, with reason, suspect the value of a cheque as payment, and there was no intimation to her that the cheque was marked. She did not, as a matter of fact, have the opportunity of taking exception to the form of tender, nor did she at any time prior to the alleged tender do or say anything constituting a waiver of a legal tender. The waiver claimed by the plaintiffs was an act of the defendant subsequent, and not prior to, the alleged tender or intimation of readiness to pay.

The defendant was entitled to the payment of $1,000. That amount was not tendered, nor was there any tender made.

The option was without consideration, and therefore revocable at any time; and it was revoked prior to acceptance on the part of the plaintiffs.

I dismiss the action with costs.

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## MANITOBA.

MACDONALD, J. MARCH 11TH, 1912.

TRIAL.

### LEVI v. LEVI.

*Husband and Wife — Separation Deed — Construction — Weekly Payments for Support of Wife — Condition — Non-fulfilment.*

Husband and wife entered into an agreement under seal, whereby they agreed to live separate and apart under the terms and conditions therein set forth. Among other things, the husband agreed to obtain, from the Jewish authorities at St. Paul, a proper form of separation according to the Jewish faith, "and to pay the expenses of procuring the said papers, but not the travelling or living expenses of the said wife;" and, in the event of the separation not being procured, the husband agreed to contribute, after three months and until the separation should be procured, $2 a week to

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**the support of the wife "until the separation is secured:" provided that, if it was impossible for the separation to be procured within three months from any default on the part of the wife, the husband was not to be liable for the $2 per week. The agreement was made in 1898; the parties separated and lived apart; the Jewish separation was never procured; and the wife, in 1911, sued the husband for the $2 a week:—**

***Held*, that she was not entitled to recover: the agreement contemplated that she should go to St. Paul, and the evidence shewed that it was necessary for her to do so in order to obtain the peculiar form of separation desired, and that she had been requested by the defendant to go and had refused.**

Action by a wife against her husband to recover a sum alleged to be due under an agreement of separation.

W. M. Morrissey, for the plaintiff.

E. J. Thomas, for the defendant.

MACDONALD, J.:—The parties are husband and wife, and in December, 1908, they agreed to live separately and apart from one another, and on that date they entered into an agreement under seal whereby they agreed to separate under the terms and conditions therein set forth.

The agreement contained the following clauses:—

"The said husband agrees to obtain from the Jewish authorities at St. Paul a proper form of separation according to the Jewish faith and religion, which is the religion of the parties hereto, and to pay the expenses of procuring the said papers, but not the travelling or living expenses, of the said wife."

"In the event of the said separation not being procured, the husband shall contribute, after the three months and until the said separation is procured, to the support of his said wife, and shall pay to the said wife as such support the sum of $2 per week until the said separation is secured."

"Provided, however, that, if it is impossible for the said separation to be procured within three months from the date hereof by reason of any default or neglect on the part of the wife or by reason of the illness of the wife, then the said husband is not to be liable to contribute to the support of the said wife or to pay the said sum of $2 per week."

The separation contemplated by the agreement was never procured, although the parties lived apart, and the wife now sues for the $2 per week provided for in the agreement.

The defence is, that, immediately after the execution of the agreement and for over three months thereafter, the defendant used every effort to obtain the separation referred

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to, and made many requests to the plaintiff and urged her to go with him to St. Paul for the purpose of securing such separation, and that the plaintiff refused and treated every effort of the defendant with contempt and derision.

The plaintiff admits that she understood it was necessary for her to go with her husband to St. Paul; and, although the agreement does not in so many words state that she was to do so, yet such must be the deduction from clause 7 of the agreement, by which it is provided that the husband agrees to obtain from the Jewish authorities at St. Paul a proper form of separation according to the Jewish faith and religion and to pay the expenses of procuring the said papers, but not the travelling or living expenses of the said wife.

It is clear from the evidence that the personal attendance of the wife with the husband before the Rabbi at St. Paul was necessary to enable the husband to carry out his agreement, and it is equally clear that the wife so understood it and knew that without her assistance the sought-for separation could not be obtained.

I find that the husband did on more than one occasion send a messenger to his wife requesting that she should accompany him to St. Paul for the purpose of securing the separation, and that she refused to render any assistance.

For four years after the agreement to separate the wife remained in Winnipeg, carrying on business and maintaining herself thereby, and not once during that time did she make any demand upon her husband, and after the expiration of these four years she left Winnipeg for the United States, where she remained for upwards of nine years, without once communicating with or making any demand upon her husband; and now, after the expiry of upwards of thirteen years, she seeks to recover the conditional support provided for in the agreement to separate.

It has been urged that, under clause 9 of the agreement, the neglect or refusal of the wife applies only to the three months from the date of the agreement, and that the husband did not, within these three months, make any move towards completing the agreement; and that, therefore, any refusal or neglect on the part of the wife after that date does not constitute any breach on her part, and she is not obliged to render any assistance to her husband after that date.

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I cannot so construe the agreement. It contemplates a separation according to the Jewish faith, and the husband is not limited to the three months within which to procure it. Clause 9 provides that, in the event of the said separation not being procured within three months, the husband shall contribute, after the three months and until the said separation is procured, to the support of his wife. This clearly shews that the separation is in contemplation of the parties even after the expiration of the three months.

If the husband did not move in the matter of securing such separation within the three months, he would he liable to contribute to the support of his wife, as provided for in the agrement; but, the husband having made efforts to induce his wife to go to St. Paul, and she having refused, she would not be entitled to such support after her taking that stand.

The evidence is not very clear as to the time when the husband expressed his readiness and the wife refused to go to St. Paul. It could not, indeed, be expected that at this late date it could be otherwise.

I am of the opinion, however, that it was within the three months, and accept the husband's evidence that he was anxious that there should not be any breach of the agreement on his part.

I dismiss the action with costs.

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## MANITOBA.

ROBSON, J. MARCH 16TH, 1912.

CHAMBERS.

## REX v. MALI.

*Criminal Law—Summary Trial — Conviction for Arson—Jurisdiction of Police Magistrate—Consent of Prisoner—Criminal Code, sec. 778—Form 55—Habeas Corpus.*

The defendant was summarily tried by a Police Magistrate and convicted of arson. The conviction recited that the defendant was charged before the magistrate, etc., "(and consenting to my trying the charge summarily) is convicted," etc.—following the statutory form (55):—

*Held*, that the magistrate's jurisdiction was sufficiently shewn: it was not necessary that the conviction should shew that the magistrate imparted to the defendant the information required by sec. 778 of the Criminal Code, prior to his election to consent to summary trial. And, it not being suggested that, in fact, sec. 778 was

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**not strictly followed—the contention being merely that the conviction should shew that the necessary words were addressed to the prisoner by the magistrate—a summons for a *habeas corpus* was discharged.**

***Rex* v. *Crooks*, 17 W. L. R. 560, distinguished.**

Application by the defendant for an order for the issue of a writ of habeas corpus with a view to the discharge of the defendant from custody.

P. E. Hagel, for the defendant.

R. B. Graham, for the Crown.

ROBSON, J.:—Peter Mali was convicted on the 28th September, 1911, by D. M. Walker, Police Magistrate, upon a charge of arson. He was sentenced to seven years' imprisonment in Manitoba Penitentiary.

The form of conviction proceeds thus: "Be it remembered that on the twenty-eighth day of September, 1911, at the city of Winnipeg aforesaid, Peter Mali was charged before me, the undersigned, one of, . . . (and consenting to my trying the charge summarily) is convicted," etc.

A summons was granted by me, on application of counsel for the accused, calling on the magistrate to shew cause why a writ of habeas corpus should not issue for the discharge of the prisoner, upon the ground that the conviction does not shew that the magistrate imparted to the prisoner the necessary information, as required by sec. 778 of the Criminal Code, prior to his election to consent to summary trial.

It is not suggested that in fact sec. 778 was not strictly followed. The objection merely is, that the proceedings do not shew that the necessary words were addressed to the accused by the magistrate.

Counsel for the accused referred to Rex v. Crooks, 17 W. L. R. 560, a Saskatchewan case. There it was noted in a memorandum of the magistrate that, being charged, the accused "does consent to jurisdiction and pleads not guilty." The conviction recited "having consented to jurisdiction." These were not the words of the statutory form (see sec. 799 and form 55). The expression used may not, for anything that appears on the conviction, have meant any more than that the accused admitted that the presiding officer was a magistrate for that locality. What must appear by the record, according to the statutory form, is, that the accused consented to the magistrate's trying the charge sum-

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marily. It may seem to be refinement of language, but I think that specific consent to such a trial is quite different from a consent to some undefined jurisdiction.

In the present case the statutory form was strictly followed. No provision of law was disclosed to me that there must be a written record of full and literal compliance with sec. 778; as well as the record of consent prescribed by form 55. The recital of consent contained in form 55 is the method prescribed by law of shewing jurisdiction; and, such mode being adopted by the magistrate, there is, in the absence of anything to impeach such record, a necessary implication that conditions precedent were observed. Were the result otherwise, it would simply mean that the Courts would be deciding that the statutory form was defective.

I discharge the summons.

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## MANITOBA.

MARCH 18TH, 1912.

COURT OF APPEAL.

## MERRIAM v. PUBLIC PARKS BOARD OF PORTAGE LA PRAIRIE.

*Building Contract — Payment — Condition Precedent — Satisfaction of Engineer — Defective Work — Progress Certificate — Taking over Work — Preliminary Estimate — Completion of Work — Substantial Performance — Powers of Engineers — Deductions — Acceptance of Defective Work — Waiver — Prevention — Contract for Payment according to Value — Representations and Warranties.*

The judgment of ROBSON, J., 18 W. L. R. 151, was affirmed; RICHARDS, J.A., dissenting.

Appeal by the plaintiffs from the judgment of ROBSON, J., 18 W. L. R. 151.

The appeal was heard by HOWELL, C.J.M., RICHARDS and CAMERON, JJ.A.

H. J. Symington, for the plaintiffs.

A. B. Hudson and E. P. Garland, for the defendants.

A. E. Hoskin, K.C., for third parties.

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HOWELL, C.J.M.:—The facts in this case are fully set out in the judgment of Mr. Justice Robson, who tried this cause.

Section 25 of the contract provides for payment for this work, and is as follows:—

"25. Said purchaser covenants with the said contractor that, if the said work, including all extras in connection therewith, shall be duly and properly executed and completed as aforesaid to the satisfaction of the engineer, and if the said contractor shall observe and keep all provisions, terms, and conditions of this contract, the purchaser will pay to the said contractor the sum as hereinbefore mentioned, in the manner and at the times mentioned in the specifications, upon estimates and certificates signed by the engineer, and such further sum or sums for extras as may be certified to by the engineer as being due and owing to the said contractor."

The only provision in the specifications as to certificates is the following: "18. Payments, each 85 per cent. of the amount of the estimate, will be made on or about the 15th of each month, upon progress estimates to be issued by the engineer on or about the 3rd of the month, for work completed during the previous month."

It is difficult to give an intelligent construction to these two clauses. The covenant in the contract is for payment upon completion to the satisfaction of the engineer; the provision in the specifications is for payment from time to time before completion.

The plaintiff simply sues on a completed contract, and alleges that he obtained a final certificate within the provisions of the above sec. 25.

The contract was one to construct a dam across the Assiniboine river, with sheet piling so as to constitute a water-tight plane, so that the water would be diverted to an old river-bed at Portage la Prairie. The structure which the plaintiffs claimed they had completed certainly did not hold the water of the river; and, from the evidence, I would not have expected it to be to the satisfaction of the engineers. Stevens, the Chairman of the Board, saw the work a day or two before the alleged final certificate was given; and, if his evidence is to be relied upon, I would not think the engineers should be satisfied.

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Smith, one of the engineers, saw the work two weeks after that certificate was given, and he swears that he then told the plaintiffs the following, "I told them that the work was not completed satisfactorily;" and he also describes the then condition of the work.

Ruddell, the agent of the engineers, the man on the work, also describes its condition when the water was raised by the stop-logs, and it certainly then—about the time the certificate was given—had not much of the qualities of a dam, and could not be called a water-tight plane, as required by the specifications.

On the 2nd August, the plaintiffs had withdrawn from the work and claimed that they had fulfilled their contract, and were entitled to their money. On that day, they went to the engineers' office for their final certificate. Objections to the work were made by Mr. Chase, one of the engineers; and on reference by him to Ruddell, it seems clear that the engineer thought something more should be done to complete the work. After some haggling, he decided that the sum of $500 should be retained out of the contract-price; and a certificate was given setting forth debits and credits as if all the work had been performed, but containing this charge against the plaintiff, "Retained pending repairs $500." After making this charge, a balance is brought out in favour of the plaintiffs of $6,607.66, and then follows: "We hereby certify that the above statement, amounting to $6,607.66, is correct and has not been previously certified." There is no statement in the certificate that the work has been fully executed or completed, and nothing respecting the satisfaction of the engineers. The certificate starts out as follows: "For work done by Messrs. Merriam & Symington up to 31st July, 1910."

There is no statement in the document that the certificate is a final one; and, on the contrary, there is a direction to retain part of the contract-price until certain repairs are made, which apparently the plaintiffs should have done. I would also infer from this that the plaintiffs had not done the work to the satisfaction of the engineers.

It was argued that, as the engineers had power to change the plan and design of the work by omitting certain portions of it, the certificate should be read as if the unfurnished part of the work had been dropped from the design, and that it



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was thereby a completed work, satisfactory to the engineers. It cannot be said that this defective work was directed by the engineers to be so done or changed or omitted as provided by sec. 10 of the contract.

Section 10 of the specifications clearly limits the time and manner in which the engineers shall grant this certificate. It is as follows: "So soon as the contractor shall have completely fulfilled the contract requirements, the engineer shall forthwith so certify in writing to both the purchaser and the contractor; and thereupon it shall be deemed that the purchaser has taken over the works."

This provision has not been complied with, for the engineers have not certified that the contractor has completely fulfilled the contract requirements.

I agree with Mr. Justice Robson that the engineers had no power to give a certificate final in its nature until the work was completed and to their satisfaction. If authority is required for this proposition, it will be found in Davidson v. Francis, 14 Man. L. R. 141, and in Canty v. Clark, 44 U. C. R. 222.

To recover on the statement of claim, the plaintiffs must prove the completion of the work, and the satisfaction of the engineers, and must produce their certificate issued under the terms of the agreement and specifications. The plaintiffffs have failed in this, and cannot recover for the contract-price.

Although not raised on the pleadings, the plaintiffs assert that, during the progress of the work, progress certificates were from time to time issued, and there is a balance due on them, and they ask now for a verdict for this amount.

It seems to me that they cannot recover for this balance, even if a case had been made for it on the pleadings. Their case on the pleadings is, that the work is completed, and now it is quite impossible to finish it because of its almost absolute destruction. They entirely withdrew from the work and asserted that it was finished.

After the engineers had withdrawn their certificate, Mr. Smith asked Mr. Symington to make the dam reasonably water-tight; but he refused, and asserted his right to stand on the certificate as a final one. The engineers shortly afterwards called upon the plaintiffs to complete the work; but they refused.

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The position of the plaintiffs is, that they assert that the contract is completed, and will do no more work.

This is not a case of suing for a claim under a progress certificate while the contract is current and is being performed, but it is a claim for part payment, when, because of non-fulfilment, nothing is payable to the plaintiffs. If, after a progress estimate was issued and before payment, the contractor had abandoned the work, he could not recover on the contract, because he had abandoned it; and it seems to me that that is practically the plaintiffs' position.

The provision in the specifications as to progress estimates, above set out, is only for provisional payments, subject to adjustment or to re-adjustment at the end of the contract, as held by Lord Cairns in Tharsis v. McIlroy, 3 App. Cas. at p. 1045. And it would be strange if now, at the end of this contract, when the plaintiffs are entitled to nothing because they have not complied with its terms, they could recover on an estimate given when the contract was in force, and all parties expected it would be carried out.

The claim of the plaintiffs because of misrepresentation as to the river-bed has been fully considered by the learned trial Judge, and I entirely agree with him.

The appeal must be dismissed with costs.

CAMERON, J.A.:—Under clause 13 of the specifications, the dam which the plaintiffs agreed to construct was to be water-tight. "All sheet piling to be so driven as to form a water-tight plane." The contract provides, in sec. 1, that the contractor shall perform, execute, and complete the works, which, by sec. 26, are defined to be the whole of the works, matters, and things required to be done. By sec. 7 of the contract, the engineer may make or order any alterations or omit any portion of the works or increase or decrease dimensions, etc., "and the contractor shall, in pursuance of the engineer's written orders to that effect, proceed with and carry out the works as directed in pursuance of such orders." Clearly, the engineer, in giving the certificate of the 2nd August, 1910, did not consider that he was, and in fact, was not, acting under this section. He gave the contractor no written orders to proceed as required thereby. Clause 6 of the specifications gives the Parks Board the right at any time to alter, deduct from, add to, or omit any part of, the work, without affecting the contract, which alteration the

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contractor shall carry out "upon written notice from the engineer." Obviously, it cannot be asserted that the engineer was acting under this clause in giving the certificate of the 2nd August, or indeed that a consideration of clause 6 enters into this case in any way.

The authority of the engineer in respect of this work is to be found altogether within the four corners of the contract (including therein the specifications); and, by no fair reading of the contract, can there be found in its terms power vested in the engineer to allow for work defectively done, or power to release the contractor from the performance of any essential part of the work required to be done thereby, and to assign the completion of any such part to himself or to others. The conclusion seems to me clear that the engineer had, under the contract, no authority to give the certificate of the 2nd August, which was, therefore, ineffective and void, and must be disregarded.

It seems plain, also, that that document, inasmuch as it purports to withhold $500 of the contract-price "pending repairs," is not final. Nor was it issued as, or intended to be, a progress estimate under clause 13 of the specifications, and it cannot be taken as such, as a reference to the wording of that clause clearly indicates.

The document of the 2nd August shews, on the face of it, that the work was not then complete, and the evidence points strongly to the same conclusion. It is only when the works have been duly executed and completed to the satisfaction of the engineer, and upon compliance by the contractor with all the provisions of the contract, that the "purchaser" covenants to pay. It is well-established law that the contractor, to recover, must assert and prove strict compliance with the contract and specifications. I refer on this subject to the judgment of Killam, J., in Brydon v. Lutes, 9 Man. L. R. at pp. 471, 472. It seems to me that the plaintiffs have here failed to meet this essential requirement.

The judgment in favour of the plaintiffs is respect of the counterclaim made by the Parks Board has not been appealed against and stands.

I have read the judgment prepared by the Chief Justice in this matter and agree with his reasoning and conclusions. I think the appeal must be dismissed.

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RICHARDS, J.A. (dissenting):—I agree with the learned trial Judge that the doctrine of substantial performance seems not to be applicable under the English decisions. The question, to my mind, simply is, whether the engineers have given a final certificate; and, if they have, whether they had power to do so.

The certificate of the 2nd August was, in my opinion, meant to be a final certificate. It begins by crediting the plaintiffs with the whole contract-price. It directs the repayment to them of their deposit given as security for the performance of the work, and also directs payment to them of $2,000, which had been held back from the estimates as further security.

There is no magic in the particular wording of a final certificate. It is sufficient that it shews on its face that it was intended to be a final one. For example, in Clark v. Murray, 11 Vict. L. R. 817, a certificate that the contractor was entitled to receive a named sum, with the words, "This being the final certificate in full of all demands," was held to be a certificate that the whole of the work was completed to the satisfaction of the architect. In Wyckoff v. Meyers, 44 N. Y. 143, the contract provided that the last instalment of the contract-price was to be paid "when all the work is completely finished and certified to that effect by the architect." The architect gave a certificate which read: "This is to certify that the last payment of $1,800 is due . . . as per contract." This was held to be, in effect, a certificate that the work was completely finished.

There is, on the face of the certificate in the present case, the following, "Retained pending repairs, $500." The evidence shews that the work was completed, but that the flooring of the sluices up-stream from the stop-logs was apparently not as tight as the engineers thought it should be, and some of the up-stream sheet piling they also thought not to be tight. The evidence further shews that the engineers decided that this might be remedied by boarding over the parts, and they further decided that they would not have this done by the contractors, but would themselves have it done or get it done otherwise. This is what the $500 was retained for.

The question arises whether the engineers had power to make these changes and then dispense with the doing by the contractors of what these changes called for.

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The case relied on by the defence is Rex. v. Peto, 1 Y. & J. 37. In that case it was provided that the surveyor might order extra work to be done, in addition to what was shewn in the plans and specifications, or might order that any part should not be done or executed. It was held that this did not give the surveyor power to alter the whole nature of the foundation of the building, as that was neither an ordering of extra work, nor the omitting of any part of the work contracted to be done, but was a substantial alteration—and the contract gave the surveyor no power of alteration.

In the present case it is provided by sec. 7 of the contract that the engineer shall have the right to make or order any alterations or changes such as he may deem advisable . . . or to omit any portion of the work, or to increase or decrease dimensions or quantity of materials or work.

By sec. 10 of the contract, it is provided that, if any work or material which the contractor shall be required to perform or supply under the specifications as directed by the engineer, be changed or omitted, whereby a less quantity of work or material is performed or supplied, then the engineer shall deduct from the contract-price the value thereof.

Sub-section (b) of sec. 4 of the specifications says that it shall be within the rights of the engineer to issue plans and specifications further detailing, explaining, or modifying the work.

Section 10 of the specifications says that, so soon as the contractor shall have completely fulfilled the contract, the engineer shall forthwith certify, and thereupon it shall be deemed that the purchaser has taken over the works.

It will be observed that the powers of the engineer are very wide, as compared with those of the surveyor in Rex v. Peto.

It seems to me, though I express the opinion with a good deal of hesitation, that the powers of alteration and omission given by the contract and specifications would enable the engineers to make an alteration or change in the work by planking over such parts of the sheet piling and sluice floors as they thought proper. The evidence shews that, in their then opinion, such sheet piling and floors would then comply with the purpose of the contract. Then, they having so decided, and having the right to order a portion of the

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work to be omitted, it seems to me that they have ordered the omission of that part so to be altered, and that on their having done so, the contract was in fact completed as required by its terms, and that the engineers were empowered to give a final certificate, which, it seems to me, they did on the 2nd August. Though the wording of the certificate is, as to the $500 item, "Retained pending repairs," the letter with the certificate, and which I think may be read with it, shews that the item of $500 was really permanently deducted from the contract-price, and not merely temporarily held back as against the plaintiffs. What it meant was, that the $500 was deducted in respect of the work changed by the engineers, and then by them omitted from the work to be done by the contractors.

Holding these views, I would allow the appeal.

*Appeal dismissed;* RICHARDS, J.A., *dissenting.*

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## BRITISH COLUMBIA.

LAMPMAN, CO.C.J. MARCH 14TH, 1912.

COUNTY COURT OF VICTORIA.

### MACLURE v. CUSACK.

*Architect — Action for Professional Fees — Services in Drawing Plans — Defence — Necessity for Satisfying Debt — Quantum of Fees — Payment into Court — Scale of Costs.*

It is not a defence to an action by an architect for payment for his services in preparing plans, etc., for a building, to say that the plans were never completed to the defendant's satisfaction. The architect is entitled to be paid for work he has done at the request of the defendant.

And *held*, upon the evidence, that the plaintiff was entitled to recover $100, in addition to $163.75 paid into Court by the defendant, with costs to the plaintiff, to be taxed on the scale applicable to $100.

The plaintiff, an architect, sued for $337.50 for services in preparing plans and specifications for a house which the defendant contemplated building. The defence was, that the plans were never accepted, and that no instructions were given to prepare specifications.

W. H. Langley, for the plaintiff.

F. C. Fowkes, for the defendant.

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LAMPMAN, CO.C.J.:—It appears that at first the defendant intended building in the James Bay district; and, after having had the plaintiff prepare a plan of a house, he decided not to build there. Subsequently, he decided to build at the corner of Cook and Collinson streets, and the plaintiff was again employed as architect—no special agreement was made, but the plaintiff proceeded with plans, and from time to time submitted them to Mrs. Cusack, who had charge of the matter for the defendant. Changes were made at various times in the plans, and visits were made to completed houses designed by the plaintiff in order that Mrs. Cusack could the better decide on what she would like. Finally, the plaintiff thought all was settled, and he submitted his plans and specifications to several builders and received tenders and sent them to the defendant. The defendant then said that he had not finally approved of the plans and specifications; and the result was that the building proceedings were dropped; and the plaintiff now sues for his fees.

The first ground of defence, viz., that the plans were never completed to the defendant's satisfaction, is, I think, bad in law. I do not think an architect's right to be paid for his work differs from that of any other professional man, or a day labourer. If I employ a man to dig for me, I cannot at the end of a week's digging say to him: "I don't like the way you dig, and I wont pay you for what you have done." Neither could I refuse to pay a surgeon simply because I did not like the manner in which he performed an operation. The employment can be terminated, but for work already done payment must be made.

In the case before me, the main complaint the defendant has with regard to the plan is in regard to a very small matter—the position of a door.

From the negotiations I am satisfied that there was an implied contract for specifications. For a time Mrs. Cusack was hurrying up the plaintiff, as she wanted to get along with the building. Both the defendant and his wife laid great stress on the fact that the plaintiff had not been instructed to call for tenders, as the wife had not yet seen the specifications; and there is no suggestion that any one other than the plaintiff was to prepare them. Besides, the visits to the interior of another house to see the finish would be, I should think, to gain information for use in the specifica-

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tions rather than in the plans. The defendant's own case is, that he was on the verge of instructing the plaintiff to call for tenders; and he surely did not expect to let a contract without specifications for a house which he probably thought would cost at least $8,000, and have hardwood floors.

The lowest tender was $13,500, and the plaintiff claims 2½ per cent. on that amount—$337.50. The claim in the plaint when issued was $327.50, and the claim for an additional $10 was made at the trial on amendment, as, at the time the plaint was drawn, the plaintiff did not have the figures of the lowest tender. Without admitting any liability, the defendant paid into Court $163.75, which he tendered in full settlement.

By an unfortunate misunderstanding, hardwood panelling was specified, making an extra expense of $2,500 or $3,000. I am satisfied that Mrs. Cusack never really intended this, and the amount of the lowest tender for the purpose of computing the fees should be reduced by $2,750. It is clear that, had the house been built, this change would have been made in the specifications; and, besides, drawing plans and specifications for hardwood entails no more work and skill than drawing them for fir or cedar. This would leave the estimate for the house $10,750, and the ordinary fee would be $263.75. I think that the defendant is entitled to have the plan shew the door as Mrs. Cusack wanted it placed; and, to cover that, I think an allowance of $5 is ample.

The plaintiff's claim is thus reduced to $263.75; and for that amount he is entitled to judgment. The costs of the action will be taxed on the scale applicable to $100, as that is the amount by which the sum to which the plaintiff is held entitled exceeds the amount paid into Court.

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## CANADA.

JULY 14TH, 1911.

BOARD OF RAILWAY COMMISSIONERS.

# CANADIAN MANUFACTURERS' ASSOCIATION v. CANADIAN FREIGHT ASSOCIATION.

*Railway — Carriage of Goods — Car-load Traffic — Deductions from Weight by Track Scales—Allowances for—New Tariff—Revision by Board — Conference between Carriers and Shippers — Allowances for Snow and Ice — British Columbia Tariff — Postponement of Date of Going into Effect.*

The railway companies for many years had had, in effect, special tariffs covering the weighing of car-load traffic, containing provisions for the benefit of shippers whereby certain allowances were made from the weight recorded by the track scales. By new tariffs filed, the railway companies proposed to do away with allowances for blocking, dunnage, and temporary racks used in connection with the bulk of the freight shipments in cars covered by these tariffs. Shippers objected to these proposals; and the Board heard evidence directed to the questions whether it was fair that the railway companies should modify these regulations in whole or in part, and whether the working thereof in the past had operated reasonably, or whether, under existing conditions, undue burdens were placed upon the carriers by reason of these provisions:—

*Held*, that the allowances should be revised; but before the Board would attempt to express an opinion as to what practice should be established and what allowances made, there should be a conference between the shippers and carriers; when these revisions were made by the carriers, it was without discussion with the shippers and without notice to them; if the matters could not be adjusted, the Board would, either upon the material now before it, or upon further hearing and evidence, dispose of all matters that the parties themselves should be unable to adjust.

The track scale allowances made by the railway companies in the past were upon a liberal scale; and the Board would expect the shippers to deal liberally and fairly with the railway companies in any reasonable attempt made by the latter to put these allowances upon a fairer basis. But some arrangement must be made with reference to allowances for snow and ice other than that suggested by the companies.

The Board made an order postponing the effective date of the British Columbia tariff until the shippers there should have an opportunity of presenting their views to the Board.

An application by the Canadian Manufacturers' Association, the Canadian Lumbermen's Association, and the Montreal Lumbermen's Association, for an order of the Board directing the Canadian Freight Association and certain railway companies, the respondents, to continue allowances for blocking, dunnage, and temporary racks, and directing that

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the railway companies' weighmen should not be allowed to estimate by guesswork the allowances to cover the weight of accumulated ice, snow, or refuse which might be in or upon the cars.

The application was heard at Ottawa, by the CHIEF COMMISSIONER and MR. COMMISSIONER MCLEAN, on the 20th and 21st June, 1911.

J. E. Walsh, for the Canadian Manufacturers' Association.

Frank Hawkins, for the Canadian Lumbermen's Association.

W. S. Tilston, for the Montreal Lumbermen's Association.

John Pullen, for the Canadian Freight Association.

L. L. Hight, for the Grand Trunk Railway Company.

W. P. Torrance, for the Michigan Central Railway Company.

E. W. Beatty, for the Canadian Pacific Railway Company.

R. H. M. Temple, for the Canadian Northern Railway Company.

THE CHIEF COMMISSIONER:—For many years the railways have had, in effect, special tariffs covering the weighing of car-load traffic, containing provisions for the benefit of shippers whereby certain allowances are made from the weight recorded by the track scales. As the tolls that shippers have to pay are based upon the weight of the commodities carried, it is of prime importance to the shipper, as well as to the carrier, that the weight should be correctly ascertained. It is usually not convenient to weigh the commodity before loading; if this course were practicable, the weight would usually be ascertained by the shipper alone; and, in the event of the carrier subsequently weighing and there being a variation, confusion and dispute would follow. The bulk of car-load traffic is loaded without weighing, the car and contents being weighed by the carrier; and, after allowance for tare, tolls are paid upon the carriers' weights. Of course, there are some large shippers having their own track scales who are able to weigh their own shipments, but

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this is the exception. A large portion of traffic originates where neither shipper nor carrier has track scales; and, as this renders weighing impossible at the point of origin, the carrier weighs at certain track scale points en route to destination. Usually the shipper or consignee is not a party to this weighing, and has no opportunity of testing its accuracy. Cars are frequently weighed without uncoupling; scales are usually exposed to the weather, snow and ice accumulate; box cars are frequently dirty, containing refuse from former shipments; ice and snow collect in them and on their tops; they absorb moisture; upon flat cars snow and ice accumulate; so all sorts of difficulties surround the weighing of car-load shipments with mathematical accuracy. It is said that the stenciled tare is frequently too low or too high, to the injury of the shipper or the carrier.

To provide for some, at least, of these conditions, the carriers many years ago established a system of deducting a certain number of pounds from their track scale weights; and these provisions have run through their tariffs ever since. As a sample of all the tariffs, the provisions, on this point contained in G.T.R. Tariff, C.R.C. No. E1165, C.R. 28, effective on the 28th April, 1908, may be taken. They are as follows:—

The following allowance per car will be made to cover variation in tare of cars, absorption of moisture, accumulation of ice, snow, etc.

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| DESCRIPTION OF FREIGHT. | Between stations east of Detroit and St. Clair frontiers; also to points in Canadian N. W., British Columbia (see note) and Kootenay district. | On traffic from points east of Detroit and St. Clair frontiers to points in New England States via St Lawrence frontier on or via the following connections:—Boston & Me. R.R., Central Vermont Ry., Maine Central R.R., Rutland R.R. |
|---|---|---|
| *Acids, in carboys, in box cars, or single deck stock cars | 1,000 lbs. | .... |
| Ashes, Dec. 1 to April 30 | 500 lbs. | 500 lbs. |
| Ashes, May 1 to Nov. 30 | 1,000 lbs. | 1,000 lbs. |
| Bark, in box cars, Dec. 1 to Apl. 30 | 500 lbs. | 500 lbs. |
| Bark, in box cars, May 1 to Nov. 30 | 500 lbs. | 500 lbs. |
| Bark, on flat cars with temporary racks, Dec. 1 to April 30. | 2,500 lbs. | 2,000 lbs. |
| Bark, on flat cars with temporary racks, May 1 to Nov. 30 | 2,000 lbs. | 2,000 lbs. |
| Bark, on flat cars with permanent racks, Dec. 1 to April 30 | 1,000 lbs. | 1,000 lbs. |
| May 1 to Nov. 30 | 500 lbs. | 500 lbs. |
| Lumber, and other rough forest products not elsewhere provided for: | | |
| In box cars, Jan. 1 to Dec. 31. | 500 lbs. | 500 lbs. |
| On flat cars, Dec. 1 to April 30 | 1,000 lbs | 1,000 lbs. |
| May 1 to April 30 | 500 lbs. | 500 lbs. |
| Blockage, dunnage, or temporary racks used in connection with shipments of Agricultural Implements. Machinery, Street Cars, Vehicles or Stoves, allow actual weight of lumber used, but not more than: | | |
| In box cars | 1,000 lbs. | As per Official Classification. |
| On flat cars | 1,500 lbs. | |
| Perishable property, when loaded in box cars lined with lumber by shipper | 1,500 lbs. | " |
| Perishable property, when loaded in box cars lined with lumber by shipper, and containing stove and fuel | 2,000 lbs. | " |
| Wood pulp (wet) | 1,000 lbs. | 1,000 lbs. |

* Applies only on shipments destined to stations in Canada West of Fort William or Port Arthur.

NOTE.—The special allowances provided for above will not apply on traffic handled under tariff issues of the Transcontinental Freight Bureau. The weights provided for in Transcontinental tariffs will govern on all such traffic.

The railway companies filed new tariffs, effective on the 1st May, 1911, as to traffic moving between points in Canada, and on the 15th May, 1911, as to traffic from or to

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points in Canada to or from points in the United States. Against these latter tariffs many complaints came to the Board from various parts of the country, and the shippers requested a hearing before they were permitted to go into effect. The Board postponed the effective dates of the same until a full presentation of the case could be made. This hearing took place on the 20th June, and the matter was discussed in its various features. The provisions of the tariffs that the carriers propose to substitute for those first above referred to are as follows:—

10. On shipments between points in Canada the following allowances will be made from weights ascertained on track scales:—

(a) An allowance of 500 lbs. weight per car will be made for standards, strips, stakes, supports, and temporary racks, on flat or gondola cars, if loaded with car-load shipments requiring their use. (See note B.).

(b) Allowance for the actual weight of ice and salt used as preservatives for perishable freight will be made when placed in the bunkers or in the body of the car, except that: When ice is used in the body of the car, and the weight thereof at destination is in excess of 500 lbs., and is delivered to consignee, freight charges will be assessed on the actual weight of the ice so delivered and at the rating provided for the freight which it accompanies. (See note B.) When ice and salt, used as preservatives, are placed in the packages with the freight, charges thereon will be assessed on basis of actual weight at point of origin and at the rating provided for the freight which it accompanies.

(c) Allowance will be made for the weight of lumber required to line box cars loaded with perishable freight, in car-loads, provided consignor makes declaration on bill of lading at shipping point as to the number of feet so used, such allowance to be computed at 2½ lbs. per foot, board measure, but not to exceed a weight based on 800 feet board measure, per car. Agent at shipping point will make notation on way-bill shewing the number of feet so used. An additional allowance of 500 lbs. per car will be made for stove and fuel. (See note B.) No allowance to be made when refrigerator cars are used.

(d) An allowance of 1,000 lbs. weight per car will be made for temporary racks on flat or gondola cars loaded with shipments of bark. (See note B.).

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(e) No allowance in weight will be made for permanent racks on flat cars, when the weight of such racks is already included in the marked or stencilled tare of the car.

(f) No allowance in weight will be made for grain doors or for the boards in doorways of cars loaded with bulk freight.

(g) Weighmen are authorised to make such allowance as they estimate covers the weight of accumulated ice, snow, or refuse, which may be in or upon the car at time of weighing; the amount of allowance and reason therefor to be shewn on way-bill and station records, also on weekly weighing report, form 10. (See note B.)

Note B.—No allowance will be made on car-load traffic which will reduce the weight below the specified car-load minimum.

It will be seen, by a comparison of the foregoing, that the proposal of the carriers now is, to do away with allowances for blocking, dunnage, and temporary racks used in connection with the bulk of the freight shipments in cars covered by these tariffs. This was strenuously objected to by the shippers. It seems to have been thought fair by the carriers, in arranging their tariffs originally, to make reasonable allowances from track scale weights to rectify any variation in the tare of cars, or increased weight thereof by reason of the absorption of moisture and the accumulation of snow, ice, and the like. These allowances have been in existence for many years, and the business of shippers has been adjusted in accordance therewith; and any change in these conditions naturally meets with objection. The point in the meantime, however, for consideration, is, whether it is fair that the carriers should modify these regulations in whole or in part, and whether the working thereof in the past has operated reasonably, or whether, under existing conditions, undue burdens are placed upon the carriers by reason of these provisions.

The railway companies opened their case by shewing with some elaboration the care taken by them in connection with the weighing of car-load traffic; and they contended that the weighing of traffic had become more careful and scientific, so that there did not now exist the reason for these allowances that formerly prevailed. The companies certainly shewed that they exercise a great deal of care in connection with testing and examining their various track scales, and

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apparently are doing everything in their power to keep these scales in a condition that accurate results may be obtained. In addition to their own regular inspections and testings, these scales are all examined and tested annually by Government inspectors; and, while in the ordinary course of events some scales must occasionally go wrong, it would seem from the evidence presented that the companies are taking all reasonable steps to keep their scales in good condition.

Evidence was also given covering the various practices prevailing with reference to stencilling the tare upon cars; and, so far as one can judge, it would seem that the companies are using due care in keeping the tare accurately stencilled, although, upon investigation into individual instances, it is surprising, notwithstanding all the care exercised by the carriers, how their stencilled tare varies from actual weights. A statement was filed by one large shipper shewing the weighing of 159 box cars during the months of August, September, and October, 1910. One hundred and fifty of these cars were owned by Canadian railways; the other nine were foreign cars. Of the total number, ten were not stencilled at all. Ninety-nine, upon being weighed, shewed that their actual weight was about 75,000 lbs. lower than the tare marked on the cars. Twenty-three shewed that their actual weight was about 7,500 lbs. higher than the tare marked thereon. In other words, about two-thirds of all the cars actually weighed were each on an average about 750 lbs. lower than the stencilled tare, and about one-seventh of the cars were each on an average about 320 lbs. higher than the tare marked thereon. It is to the credit of the shipper who weighed these cars that he paid tolls upon the actual weight, and did not take the advantage of the carriers that possibly was open to him by reason of the stencilled tare being erroneous. It is altogether likely, however, that the foregoing state of affairs does not usually prevail. The Board received, since the hearing, statements from various shippers shewing a different state of facts, and that the result of their weighing disclosed that a majority of cars weighed more than the tare marked thereon. At any rate, no matter what the actual result might be if all the cars were accurately weighed, it certainly seems that there is a variation between their actual weight and the stencilled tare. This, I presume, was one of the reasons why the carriers originally thought it proper to make reasonable

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allowances from track scale weights. Of course it must make a difference whether a box car is wet or dry. This was one of the grounds for the original allowance by the carriers. It must be extremely difficult to shew, at all times, by the stencilling, the actual weight of the car. It must also be difficult to obtain with scientific accuracy the weight of any box carload of traffic under varying weather conditions, both as these may affect the car itself, and the scales upon which it may be weighed. The best that can be done under these varying conditions is to obtain as accurate weights as possible. These may sometimes favour the carrier and sometimes favour the shipper.

Clause (g) in the proposed tariff was strenuously objected to by the shippers; and by it the companies apparently propose to leave the weighmen to guess at whatever weight should be allowed for ice, snow, refuse and the like, which may be in or upon the car at the time of weighing,—these weighmen to give the reasons for any allowance they may make, and these to be shewn on the way-bills and station records, as well as on their weekly weighing reports.

From statements filed, the Canadian Pacific Railway Company on its eastern lines has some forty-three track scale points, and the Grand Trunk about forty-seven. Elaborate statements were submitted, shewing the result of weighing cars upon these various scales, both coupled and uncoupled.

As before stated, when the bulk of this traffic is weighed at these track scalepoints, it is in the absence of the shipper. Now, a car comes in upon which the weighman thinks some allowance should be made for accumulation of snow and ice. No one is there upon behalf of the shipper. How is the judgment of the weighman with respect to what allowance should be made to be checked? It would seem that a provision of the kind proposed by the carriers will leave this whole matter absolutely in the hands and under the control of the railway companies, through the medium of their weighmen, and the shipper can have no voice whatever with respect to what allowance should be made upon this account. Is it any fairer that this should be left absolutely in the hands of the railway companies, than it would be if it were left absolutely in the hands of the shippers? And I fancy the shippers themselves would hardly suggest that it should be left absolutely to them to say, under all circumstances,



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what allowances they should get for accumulation of snow, ice, and the like. It does not seem to the Board that this provision should be permitted. It is not a weighing at all—it is a mere guess by some one in the employ of the railway company. It is not being suggested that these weighmen would not exercise their best judgment, and give the best guess possible, but it is the principle of leaving arbitrarily in the hands of the carriers the fixing of this allowance, and depriving the man who has to pay the bill of any voice whatever, either in the estimate, or in endeavouring to have it corrected afterwards if he thinks the estimate too low. If some arbitrary sum cannot be agreed upon, some other system will have to be devised than that proposed.

The statements submitted by the shippers shewing the actual weights of dunnage used in connection with the different commodities vary greatly. Some shippers shew that they use from twelve to fourteen hundred pounds, and are allowed a thousand.

Other shippers use on an average six hundred pounds and are allowed a thousand. One statement filed shewed that a large number of cars had been shipped, upon which 1,000 lbs. on each had been allowed for dunnage and not over 600 lbs. on each had actually been used. Of course, it must be that some shippers require to use a greater weight of dunnage, blocking, and the like than others; and the result of the whole inquiry certainly leaves the impression that these allowances should be revised; and it seems to the Board that, before it attempts, upon the material before it, to express an opinion as to what practice should be established and what allowances made, the shippers and carriers should have a further conference in connection with these matters. The Board has less hesitation in making this suggestion because, when these revisions were made by the carriers, it was done without discussing the situation with the shippers, and without giving any notice, other than the submission of the tariff, that these radical changes were suggested. The hearing disclosed that the traffic officers of the railway companies had gone into this whole matter very fully and thoroughly. It may, however, be that upon a full and frank conference and discussion with the shippers or their representatives, modifications of the proposals made by the carriers may be made that will be acceptable to the shippers. However, whether this is so or not, the Board is

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of the opinion that these matters should all be fully exhausted between the parties interested; after which, if the matters cannot be adjusted, the Board will, either upon the material now before it, or upon further hearing and evidence, dispose of all matters that the parties themselves are unable to adjust.

In expressing this opinion, the Board has no hesitation in saying that, in its opinion, the track scale allowances made by railway companies in the past have, so far as the evidence discloses, been upon a liberal scale; and, without attempting to dispose finally of the matter, the Board will expect that the shippers will be prepared to deal liberally and fairly with the railway companies in any reasonable attempt made by the latter to put these track scale allowances upon a fairer basis. As already indicated, however, some arrangement must be made with reference to allowances for snow and ice other than that suggested by the companies.

When the case was being heard, Mr. Walsh drew attention to the fact that tariffs were in force in British Columbia making allowances for variation in tare caused by moisture, accumulation of ice, snow, and the like, on lumber and other forest products, between the 1st December and the 30th April, of 500 lbs. on box cars and 1,000 lbs. on flat cars, and between the 1st May and the 30th November, of 500 lbs., on both box and flat cars.

It is now brought to the attention of the Board that the Canadian Pacific Railway Company intends to withdraw the tariffs making provision for these allowances for variation, and intends to cancel them as of the 1st August; and, in commenting upon this intention, Mr. Beatty, upon behalf of the Canadian Pacific Railway Company, says that the reasons which impel his company to take this action are that its traffic officers consider that they would be unable to justify any difference in treatment as to shipments from British Columbia, and that the allowances proposed to be made in the east are the only ones which the company thinks can be consistently granted without working discrimination between shippers. The proposal to withdraw these allowances from British Columbia points has reached the shippers there; and they, not having been heard or consulted in the matter, naturally object to so serious a change, without at least an opportunity of adjusting their business in accord-

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ance with such change if it is to be made. A representative of the British Columbia lumbermen appeared before the Board, but was told that British Columbia was not affected by these tariffs, and so made no presentation of the case of the shippers there.

It seems to the Board that it is proper to pursue the same course with reference to this proposed change in British Columbia tariffs that is to be taken with reference to the tariffs proposed by the railway companies now under consideration. Radical changes of this sort should not be made, even if proper, without a longer notice to shippers. There may be many large contracts made by British Columbia lumbermen based upon existing tariffs that would extend far beyond the effective date of this proposed change, and which change might work serious loss if the effective date was permitted to remain as of the 1st August.

An order must, therefore, go similar to the one made on the 29th March last, above referred to, postponing the effective date of the proposed British Columbia tariff until the shippers there have an opportunity of presenting their views to the Board, or until possibly the conference hereinbefore directed may be had; and possibly such conference may include a discussion of the situation in British Columbia with the shippers or their representatives from that province.

The Board has the less hesitation in directing this course, because, when the tariffs now under discussion were filed, these allowances to British Columbia mills were continued by supplements to the lumber tariffs filed, effective on the same date as those now being considered. These, as has been stated, were in effect when this case was heard; and it is only since the discussion that the company has decided to withdraw these allowances to British Columbia mills.

MR. COMMISSIONER MCLEAN concurred.

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## CANADA.

SEPTEMBER 1ST, 1911.

BOARD OF RAILWAY COMMISSIONERS.

# VANCOUVER AND PRINCE RUPERT MEAT CO. v. GREAT NORTHERN R. W. CO.

*Railway—Carriage of Goods—Suitable Equipment of Cars for Purposes of Particular Traffic—Duty of Carrier—Increase of Rate in Proportion to Expense—Tariff of Rates—Change in — Absence of Evidence to Justify — Restoration of Former Rates—Rebates—Jurisdiction of Board of Railway Commissioners.*

A railway company, as carriers, must furnish equipment reasonably suitable for carrying the traffic of the shipper. In each case it is a question of fact whether the particular equipment is or is not suitable for carrying the particular traffic that is offered.

And in this case, where the complaint was, that a sufficient number of suitable cars were not furnished for the shipping of meat, the Board found as a fact that "suitable accommodation" included the furnishing of cars with cross-pieces at the top for the shippers to put their hooks on for their meat; and that the complaining shippers were not furnished with enough cars of that kind; and an order was made requiring the company to provide cars accordingly.

If the carrier is required, under the law, to furnish a higher or more expensive class of equipment for carrying a certain kind of traffic than for another, the law intends that the extra expense shall be provided for in the rate that is obtained.

On the 3rd October, 1910, the railway company issued a tariff of rates upon shipments of meat; that tariff went into effect, and traffic moved under it. It remained in effect from October, 1910, until the 1st August, 1911, when a supplementary tariff was filed, under which the rates were more than doubled:—

*Held*, upon a complaint of shippers, that, as the railway company had not given any evidence to shew that the old tariff was not remunerative, an order should be made cancelling the new tariff, and directing the railway company to reinstate the old one, which should remain in effect for at least a year.

The Board has no jurisdiction to order rebates of any kind.

Application by the Vancouver and Prince Rupert Meat Company for an order requiring the Great Northern Railway Company to furnish an adequate supply of cars duly equipped for the carriage of fresh meat and packing-house products, and dissallowing an increase in rates.

The application was heard at Vancouver on the 1st September, 1911.

Russell, for the applicants.

Costello, for the respondents.

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Judgment was delivered at the close of the hearing.

THE CHIEF COMMISSIONER:—The Vancouver and Prince Rupert Meat Company complain that the Great Northern Railway Company failed to furnish them with "duty paid" refrigerator cars for the traffic in question between Sapperton and Vancouver. The meat company located upon certain land of the railway company, leasing some and buying some adjacent.

It does not appear clearly when the question of rates was first taken up. It is said on one side that it was taken up before the building was complete, and on the other side it is said that it was not taken up until after they were ready to ship. It does not make much difference when it was taken up; the negotiations resulted in an arrangement being made whereby the railway company agreed to do certain things for the shippers, to furnish certain cars, and to carry their traffic at a certain rate.

Dealing first with the kind of equipment that they agreed to furnish, the parties are at variance as to that. It is just another illustration of people relying upon a verbal arrangement in connection with an important matter of this kind; and we find here just the same state of facts that one always expects to find, namely, a variance of memory as to what the actual arrangement was. The verbal statements differ. No one suggests that either side is misstating intentionally. It is all attributable to the uncertainty of relying upon one's memory. The letters differ. One side writes that two of the Great Northern cars were to be furnished, and the other side says that the conversation was, that they were to furnish four and the shippers two. Now from this contradiction, both written and verbal, we have got to draw such inferences as best we can. Entirely apart from any verbal bargain as to the kind of equipment that should be furnished, the law requires the company—requires all railway companies—to furnish suitable accommodation for carrying traffic. Now, it goes without saying that the accommodation furnished by a car for one kind of traffic would not be at all suitable for another kind of traffic. The railway company have imposed upon them the obligation of furnishing equipment reasonably suitable for carrying the traffic of the shipper. The sort of car that would be required to carry fresh meat would be an entirely different car from that required to carry a load of telegraph poles or a load of stone, or some-

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thing of that kind; so that the law requires a railway company to furnish the shipper a different sort of car for the carrying of fresh meat; and it seems to us that, under the statute, quite apart from the rules of the Interstate Commerce Commission, which were made under a different law and under a different statute, in each case the fact must be decided as to whether the particular equipment is or is not suitable for carrying the particular traffic that is offered.

It seems to us that the proper finding on the question of fact is, that suitable accommodation would include the furnishing of these cross-pieces to the top of the car for the shippers to put their hooks on for their meat. The company did not furnish that kind of car; they have that kind of car in service. They did furnish one or two cars of that kind, but not enough to carry this traffic. This company, according to the railway company's powers, according to the quantity of cars they had to distribute properly among their patrons, were entitled to enough cars of that character to carry their traffic. They were not furnished with enough cars of that kind. We think the railway company were to blame for not furnishing sufficient cars suitably equipped for the carrying of this traffic. In the future they must furnish sufficient cars—always, of course, if they have them on hand, and I mean by that, that they have a reasonable amount of equipment distributed properly among the various persons who require it. They must furnish the class of cars required for carrying this fresh meat. They knew the industry that was being started; they were familiar with it from the commencement; and the law requires them to furnish, as I have said, the cars properly equipped for carrying this traffic. The shipper should not be at the expense of equipping these cars. It is the duty of the carrier to do that, and it is taken care of in the carrier's rate. If the carrier is required, under the law, to furnish a higher or more expensive class of equipment for carrying a certain kind of traffic than for another, the law intends that that extra expense in connection with the equipment shall be taken care of in connection with the rate that is obtained. It does not seem, though, that in this case there is any very great expense involved in connection with furnishing these cars in the way they should have been, with these timbers or cross-pieces on the top to put these hangers or hooks on. So that, in connection with complaint No. 3, an order may go

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requiring the company to furnish cars suitably equipped for carrying these meats for these shippers, and those cars must include the necessary cross-pieces or beams, or whatever they are called, to put these hooks on.

In connection with the complaint about these rates (No. 40), when this industry was started, or some time, it is said by Mr. Costello that, after it was started, there was some negotiation about a rate. It does not seem to us to be very material to follow closely the negotiations that were entered into, but it is sufficient to start at what was done by the railway company. On the 3rd October, 1910, they issued their tariff, effective on the 10th October of that year, granting these commodity rates upon these meats, fresh, cured, smoked, dried, or salted, from Sapperton to Vancouver 5 cents per hundred pounds and switching rates, at pp. 46 and 47 of the tariff, as amended. Now, that tariff went into effect, and traffic moved under it. It remained in effect from October, 1910, until the 1st August of this year, when a supplementary tariff was filed, under which the rates are more than doubled.

It is said that the charges of $22 per car and the 20,000 pounds minimum were made in error, and they should have been upon a mileage basis, and should have been 9 cents; but the bills produced all shew that on the last five cars that moved these shippers were charged $22 per car instead of something like $8.50 under the old arrangement.

Now, the tariff put into effect in October of 1910 may have been too low. It is to be presumed that it was not too low. Before the railway company are permitted to increase it, the law requires them to shew that the tariff that they put in, in the first place, was unremunerative. There is no evidence whatever here that the tariff of 1910 was not remunerative. There has been no evidence given to justify the increase of more than double in the toll and raising the minimum from 17,000 to 20,000 pounds. It is said that some disagreement arose between the shippers and the company; I do not know how that is. It is said by the shippers that a certain reason was given by Mr. Costello for increasing the tariff; and Mr. Costello says the shipper is under a mistake; that he did not give that reason at all; but these matters are not evidence that the old rate originally established was not remunerative. The railway company have not given any evidence to shew that the old rate was not remunerative. It

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was put in by them voluntarily, traffic moved under it; and the presumption is, that it was remunerative. Under the heading of complaint No. 40, an order may go cancelling the tariff that was filed on the 18th July, effective on the 1st August, and directing the railway company to reinstate the tariff of October, which shall remain in effect at least during the period of one year. If, during that time, the railway company can accumulate statistics to shew us that this rate is not fair, or unremunerative, an opportunity then will be given to them to increase their rates. In the meantime that evidence has not been given, and the old rate will remain in effect, as I have said, for a period of one year.

Russell:—Your Honour, I ask you to make an order to rebate to us the amount of cash paid out for fitting up cars, and also rebate of overcharges.

The Chief Commissioner:—We have no jurisdiction under the statute to order rebates of any kind.

Russell:—It is cash paid out on their cars.

The Chief Commissioner:—I cannot help that.

Russell:—Have we to pay this $12 a car and let it go?

The Chief Commissioner:—I have not said that. I said that we have no jurisdiction to order any rebate. I cannot help what it is for; the law does not allow us to make any order for a rebate. There are Courts here in this province where people can obtain redress, where they cannot get it under the Railway Act through the medium of this Board.

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## CANADA.

AUGUST 19TH, 1911.

BOARD OF RAILWAY COMMISSIONERS.

## EBY v. GRAND TRUNK PACIFIC R. W. CO.

*Railway—Location of Stations—Direction of Board of Railway Commissioners.*

**The Board will not require the establishment of a station within two or three miles of another one.**

**In this case the Board declined to interfere with the location of stations proposed by a railway company.**

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Applications by Eby and others for orders directing the the Grand Trunk Pacific Railway Company to erect and maintain stations at Kitsumkalum and Stewart's Landing.

The applications were heard by the CHIEF COMMISSIONER and MR. COMMISSIONER MACLEAN, at Prince Rupert, B.C., on the 19th August, 1911.

F. Peters, K.C., for the applicants.

D'Arcy Tate, K.C., for the railway company.

Judgment was delivered at the close of the hearing.

THE CHIEF COMMISSIONER:—Some forty or fifty persons petition the Board for an order directing the railway company to erect and maintain a station at Kitsumkalum; and Mr. R. O. Jennings, road superintendent of Prince Rupert district, applies for the establishment of a siding and flag station at Steward's Landing at the mouth of the Copper river. The two applications are somewhat connected, were heard together, and may be so disposed of.

The railway crosses the Kitsumkalum river at about mileage 89.5 from Prince Rupert. The first station beyond or north of this river is Littleton, at mileage 94.3. Eby and his associates want a station at or near mileage 90 or at a point about one-third of a mile north of the river.

Two serious objections exist against this location. The track comes off the bridge over the river on a 4-10 grade, and this continues for two or three miles; so the location of a station at the point asked would involve a yard on a 4-10 grade, or else the bridge would have to be raised and a very large amount of filling done. A main waggon road comes down to the Skeena river from the north-west, and this the railway crosses at about the point the applicants want the station located. This highway would either have to be diverted, or the crossing would be left either through or at about the neck of the yard.

The Board could not require a company, under any ordinary circumstances, to locate a station on a grade of this character, with a bridge over a large river at one end of its yards, and so we are unable to grant this application.

With regard to the application for a flag station at Stewart's Landing; this place is just at the mouth of the Copper river, which flows into the Skeena from the east,

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the railway being located along the west bank of the latter river. The company proposes locating a station at mileage 100, and this on the time-table is called "Copper River," although it is known locally as Newtown.

We have already determined that the company's location at Littleton is well selected. Their Copper River station is about 7 miles on; and so the request is that the company establsh another station between these two points or about three miles northerly from Littleton and about two miles southerly from Copper river.

I am not aware of any case where the Board has required the establishment of a station within two or three miles of another one. We have had applications of this sort from old and thickly settled localities, but the same have been declined. We had an opportunity of inspecting the points in question. There is but little clearing done and only a few houses to be seen, but some of the witnesses seemed to be under the impression that they were entitled to have a station on every farm if they so wished. If stations were located at Kitsumkalum and Stewart's Landing instead of at Littleton and Copper River, no doubt a good many people would be convenienced, but about an equal number would be inconvenienced unless the company were required to locate stations at all four of the points in question, which would mean four stations in less than 11 miles, and this would be absurd.

We think the locations proposed by the company should not be interfered with.

MR. COMMISSIONER MCLEAN concurred

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## CANADA.

SEPTEMBER 1ST, 1911.

BOARD OF RAILWAY COMMISSIONERS.

# CANADIAN PACIFIC R. W. CO. v. COQUITLAM LAND-OWNERS.

*Railway — Expropriation of Land—Right of Eminent Domain—Land Taken for Terminals and Yards — Bona Fides—Extent of Area—Terms and Conditions.*

**Railway companies have the right of eminent domain; not for their own benefit, but for the purpose of acquiring sufficient accommodation to give reasonable facilities to the public.**

**Under sec. 178 of the Dominion Railway Act, the Canadian Pacific Railway Company were allowed to take a strip of land about two miles in length by from 2,500 to 2,700 feet in width as additional to what they had already taken under sec. 177, to provide additional space for terminals, railway shops, storage yards, and the like, at Vancouver.**

**The provisions of sec. 178 being strictly complied with, the company were entitled to acquire the lands, unless it was established that the application was not *bonâ fide;* and that was not established.**

***Semble*, that, while the area was large, it was better that too much land should be taken, so long as it was taken honestly for the purpose of affording public facilities, than that the area should be too much curtailed.**

**An order was made allowing the expropriation, subject to certain conditions set out below.**

Application by the Canadian Pacific Railway Company, under sec. 178 of the Dominion Railway Act, for an order permitting the company to expropriate a large tract of land in Coquitlam to be used for terminals, shops, storage yards, and other railway purposes.

The application was heard at Vancouver on the 31st August and 1st September, 1911.

J. E. McMullen, for the company.

S. S. Taylor, K.C., and J. S. Mackay, for certain land-owners.

Other land-owners appeared in person.

Judgment was delivered at the close of the hearing.

THE CHIEF COMMISSIONER:—This application is launched under sec. 178, which amplifies the provisions of sec. 177, by conferring upon railway companies the right to acquire additional lands where the lands acquired under sec. 177 are insufficient for the purposes of the company.

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The application here is to acquire a large tract of land in Coquitlam for the purpose of terminals, railway shops, storage yards, and the like, and the application is opposed by the majority of the individual owners of the properties that it is sought to dedicate for railway purposes. It is perfectly natural for any one to object to having a railway company, or indeed anybody else, come along and take his property away from him without his consent. The law, however, in the interest of the public, gives to railway companies the right of eminent domain. It is not for the benefit of the railway companies. The principle of it is, that the railway company have this right for the purpose of acquiring sufficient accommodation to give reasonable facilities to the public. People are prone sometimes to think that a railway company are taking steps of this kind for their own selfish motives. That is not the feature of it at all. The Canadian Pacific Railway Company find themselves without adequate terminals. They find that the growing needs and demands of Vancouver and the vicinity impose upon the railway company the obligation of getting additional lands in order that they may supply the public with the proper facilities and accommodation. Then they come here and by this application say that they want a strip of land about two miles in length by some 2,500 or 2,700 feet in width. The particulars of the needs of the railway and the purposes for which the land is to be used are specifically defined in the affidavit filed connected with the application. One of the vice-presidents and one of the engineers swear to the necessity of these lands for the purposes detailed in the application. The provisions of sec. 178 are strictly complied with. That gives the company a right to acquire the lands covered by the application, unless it is established that the application is not bona fide, and that the railway company do not need, for the purposes of the public, the lands sought to be taken, or that they are acquiring them for some ulterior purpose, some purpose outside of the provisions of the Railway Act, such, as some one suggested early in the discussion, as town-site purposes. Railway companies may buy land for purposes of that sort like any private individual may, but they have not the right to expropriate for other than the purposes defined in sec. 178. It is not to be presumed that the railway company are making this application other than for the purposes covered by sec. 178. The contrary is

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sworn to. Anybody who knows the existing conditions in this city knows that the Canadian Pacific Railway Company are in dire need of additional land in order that they may provide better terminals than they now have.

The company have selected this place as being a convenient and proper one for the location of these facilities. There has been no evidence given that the extent of the area sought to be acquired is unreasonable. It has been stated that, in the opinion of counsel and some of those interested, the area must be too large. We have no way of saying that they are taking too much land now. It is sworn that this area is necessary. It has not been successfully controverted. It strikes one as being a large area; but, assuming bona fides in connection with the application, as we do not only assume, but find, we have no alternative, it seems to us, than to be guided by the judgment of those placed in charge of the management of this railway. They are the best judges of the area required. Of course, if so large a tract were asked as to strike one upon the face of it as being absurd, the application should not succeed; but that is not this case. While one not having an intimate knowledge of the growing needs and demands upon this railway might feel that it looks like a large tract, yet it is not sufficient to overthrow the judgment of those supposed to know what the requirements of the railway company are. Those in a position to know have pledged their oath as to what those requirements are; and the only alternative is, it seems to us, to accede, upon reasonable conditions, to the request made by the railway company.

It has been argued that we have no right to take into our consideration what may happen in the future. Perhaps we have not. But, on the other hand, where one is impressed with the fact that a particular community is growing very rapidly, and that the demands upon a railway's facilities this year cannot be any criterion of what the demands must, in the ordinary course of events, be three years hence, under those circumstances it does not seem at all unreasonable to accede to a request from a railway company where one may think, perhaps, the area is large. It is much better, it seems to us, that too much land be taken, so long as it is taken honestly, for the purposes of affording public facilities, than that the area should be too much curtailed. It is much better, for instance, that this vacant land now, while there

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are no improvements, and no streets, and no buildings upon it, should be acquired, than that this area should be too much curtailed, and in three years hence the railway company, finding their facilities entirely too cramped, should be compelled to tear down people's houses and level streets in order to acquire facilities that might just as well have been acquired to-day at much less destruction of private property. From every point of view, it seems to us desirable, in the interest of the public and in the interest of all concerned, that this application should be granted, and that no further obstruction should be placed in the way of this undertaking.

There are certain terms, however, that it seems reasonable to impose, and one is, that these little portions of the lands of Munro and McNair should be taken care of by the company. They are proposing to take the greater portion of the holdings of Munro and McNair, and the railway company must make proper arrangements with them with reference to the balance of their holdings, if they do not take the whole of it.

Then with reference to the land covered by the options and which are now in the Court. We think it is reasonable that the operation of the order with reference to the lands in litigation should be stayed until the determination of those law-suits. In other words, before the company acquire possession of these lands, it should be known whether they are taking title under this expropriation order, or whether they are taking their holdings under the contract contained in the option.

If the company take that view of it, their litigation may be determined; they can put an end to these appeals and so on, and take title and possession under this expropriation order without further delay. If, on the other hand, they continue the litigation, the operation of the order must be stayed until that litigation is concluded, irrespective of the deposit of the authority, plans, profiles, book of reference, and application, with the registrar.

The date of fixing compensation, if the litigation proceeds, shall be that provided for in sec. 3 of ch. 32 of 8 & 9 Edw. VII., namely, the date of the acquisition of the lands under this order.

With those provisions the order may go.

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McMullen:—Mr. Chairman, there is just one remark I would like to make. As I understand the order as to the determination of the litigation, of course that is an indeterminate contract, and the first thing to be done in connection with this undertaking is to provide the substituted roads. This road could be carried along here on land already acquired, if we were permited to take a small strip off our own property. I would ask the Board to modify that, and not obstruct the completion of these roads pending the determination of the litigation. That would require only a small strip here (indicates on plan). As to acquiring Mr. McNair's land, it is largely covered with water, and is not land fit for railway purposes.

THE CHIEF COMMISSIONER:—You are asking to take only the good part of the land the man has got and leave him the bad?

McMullen:—I do not know that. I think the land is all of a similar character.

THE CHIEF COMMISSIONER:—I do not see what we can do about that, Mr. McMullen.

McMullen:—If we were in a position to go on and finish the roadway, it would only mean the taking of a narrow strip, about 200 feet, along the railway; and the road has to be built before anything else is interfered with.

THE CHIEF COMMISSIONER:—What title are you going to take this strip under? That strip is covered by litigation.

McMullen:—If the Board is disposed to give us the order as to that now, we understand that we have a right to make the application at any time to get that strip if we find it necessary in the progress of the work?

THE CHIEF COMMISSIONER:—I do not know. I do not see what we can do. I do not see why you do not either buy land or else expropriate it. What is the sense of pursuing a man with a jack-knife in one hand and a gun in the other? It only complicates it. There must be a provision in that order too—that escaped my attention at the moment—with reference to this mill-site of Mr. Shields. The order must

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contain a provision that, if a mill is built on the remaining portion of his land, the railway company shall provide him with proper railway facilities for the shipments to and from his mill; and that, if the expense that he was put to in connection with his present facilities is exceeded by the expense he may be put to in connection with getting facilities for his mill to be built, if that is not taken into consideration by the arbitrators in fixing the compensation that he may be entitled to, then the Board will reserve that question when the time comes for him to get his additional facilities if he builds on that site.

The application was granted subject to the following conditions:—

(a) That the applicant (if required within ten days after making the award) must purchase from the land-owners, portions of whose lands are authorised to be taken, the remainder of their lands, at the same rate as may be fixed by the award for the portions taken; but, should the amount awarded for the portions taken include compensation for damages to the remaining lands, then such amount shall be deducted from the purchase-price of the remainder of said lands.

(b) The operation of the order shall be stayed as to the lands covered by options until the pending litigation is terminated, when, if expropriation takes place, the compensation to be awarded shall be based upon the value of such lands at the time the applicant actually acquires title thereto pursuant to 8 and 9 Edw. VII. ch. 32, sec. 3.

(c) The applicant shall provide the Pitt River Lumber Company with suitable railway facilities for the mill proposed to be erected on its lands adjoining those authorised to be taken; and, if the extra expense of the new facilities over the cost of the present railway facilities is not taken into consideration in the compensation awarded for the portion taken, the question of such additional expense shall be reserved for further consideration.



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## CANADA.

AUGUST 31ST, 1911.

BOARD OF RAILWAY COMMISSIONERS.

## CURRIE v. CANADIAN PACIFIC R. W. CO.

*Railway—Carriage of Goods — Traffic Rate — Overcharge — Mistake — Application for Refund — Jurisdiction of Board of Railway Commissioners — Reimbursement of Expense Incurred by Applicant.*

Upon evidence brought before the Board, it was *held*, that the applicant had been overcharged 60 cents upon a shipment of goods; but the Board had no jurisdiction to order a refund, and could do no more than find that an overcharge had been made.

The Board declined to order the railway company to reimburse the applicant the expense that he had been put to in coming before the Board and establishing the overcharge; but intimated that it might be necessary at some future time to make a precedent, if railway companies do not take steps to rectify palpable errors.

Application by one Currie for an order directing the Canadian Pacific Railway Company to refund an overcharge on the transportation by water of a shipment of carbide from Vancouver to Alberni, British Columbia, and for a reimbursement of expense in obtaining redress.

The application was heard at Vancouver, on the 31st August, 1911.

The applicant appeared in person.

W. B. Lanigan, for the railway company.

Judgment was delivered at the close of the hearing.

THE CHIEF COMMISSIONER:—This matter is not a very heavy one, but it must be dealt with in just the same manner and the same principle applied as if the amount were large.

Mr. Currie had a shipment consisting of a one hundred pound can of carbide, forwarded from Vancouver to Alberni. It went by Canadian Pacific barge to Victoria, and was there transferred to the wharf from which the boat sailed to Alberni, and was carried on to Alberni from Victoria and delivered at Alberni upon the wharf there, all by the Canadian Pacific Railway Company.

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Section 7 of the Act makes the provisions of the Railway Act with respect to tariffs for rail haul apply to a movement of this sort; so these tariffs are under the control of the Board.

The charge is made up by the railway company in their answer amounting to $2.05, namely, Vancouver to Victoria, 35 cents, cartage, Victoria Station to wharf, 25 cents, wharfage, Victoria, 10 cents. Then 3 cubic feet at $16 a ton upon the basis of 40 cubic feet to the ton, $1.20, wharfage at Alberni, 15 cents, total, $2.05. Now $2.05 is what Currie says he paid for this movement, and $2.05 is what the answer of the railway company, filed on the 1st April last, admits that Currie paid, and the $2.05 is made up in that way.

Now a copy of a receipt is produced shewing apparently that the man paid $1.90 and not $2.05.

Lanigan:—The wharfage would add on 15 cents.

THE CHIEF COMMISSIONER:—That may account for the other 15 cents, wharfage at Alberni 15 cents. That probably does account for it. That 15 cents plus $1.90 will make the $2.05.

Now a mistake arises in connection with the measurement of this can. The railway company charged upon the basis of three cubic feet, and the actual measurement was 1.44 cubic feet, as certified by the shippers of the can of carbide. That would entitle the company to charge for a foot and a half, which would be 60 cents instead of $1.20. That would make the total charge 1.45 instead of $2.05. There has been an overcharge of 60 cents. The railway company will, of course, refund that to the shipper. There is no authority given to us to order the refund. All we can do is to find that there has been an illegal charge of 60 cents in connection with this shipment.

The complainant asks to be reimbursed the expense that he has been put to in coming here and ventilating this trouble. We have never yet ordered a railway company to reimburse an applicant for his expenses, or for his time. It seems upon the face of it entirely unreasonable that a man should be dragged all the way from Alberni here at a loss of three or four days and an outlay of $15 or $20 (the most of which goes to the Canadian Pacific Railway-

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Company) in the way of travelling expenses, and all the redress that he gets is the empty and hollow victory of getting 60 cents back from the company. On the face of it, I say all that seems absurd—that through the error of the railway company this man should be put to that trouble and expense, and the railway company be permitted to make out of him in railway and boat fare probably thirty or forty times as much as they have to reimburse him by reason of this mistake.

But, on the other hand, we never have yet set a precedent; and, if we commence, it is impossible to say in what cases we shall have to order the payment of these expenses; it will lead to untold trouble, and probably in the end may work greater injustice than it will to leave the injustice where it stands, namely, upon this man, who has to go to all this trouble and expense to get that 60 cents; if the principle is adopted of making a railway company pay costs when they lose, they should get costs when they win, and so people would be afraid to make complaints for fear, if unsuccessful, that they would be compelled to pay heavy costs, as they do in law Courts. In saying this it is not intended in any way to reflect upon the railway company. There is no doubt whatever that this was entirely an error; and there is also no doubt that, if the true state of facts had reached the proper quarter, it would have been promptly rectified; but still the system must remain open to criticism that subjects a man to the trouble that this man has been put to. It does seem to me that, when this complaint came to Mr. Jones, or whoever it is, it was his duty, or it was the duty of somebody, to get it to the proper quarter. Currie could not know to whom to send the complaint. There is not one man in one hundred who would know the proper officer to deal with this. It seems to me that there ought to be some way of avoiding difficulties of this kind; and, if they are not avoided, and if railway companies do not take some steps to rectify a plain and palpable error of this kind, it may be necessary at some future time for the Board to adopt a principle and make a precedent that will compel the railway companies to reimburse unfortunate men who have to go to such trouble and expense to get back trivial sums.

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## MANITOBA.

ROBSON, J. MARCH 5TH, 1912.

CHAMBERS.

## ALEXANDER v. SIMPSON.

*Pleading — Statement of Claim—False Imprisonment—Slander—Joint Charge against three Defendants—Embarrassment — Misjoinder of Parties — Collusion — Conspiracy.*

**In an action for false imprisonment and slander, against the same three who were defendants in *Messervey* v. *Simpson, ante* 531, an order of the Referee in Chambers striking out certain paragraphs of the statement of claim was affirmed.**

**Paragraph 2 alleged two causes of action for false imprisonment, one against two of the defendants, the other against all three:—**

***Held*, that, while it may not have been necessary to direct that this paragraph be struck out, with leave to substitute allegations in separate paragraphs, the discretion exercised by the Referee should not be interfered with.**

**Paragraph 3 and parts of paragraphs 4 and 5 were objectionable, for the reason mentioned in *Messervey* v. *Simpson, ante* 531, and the Referee's order striking them out must stand.**

**Paragraph 6, alleging that the two individual defendants, in collusion with the company defendant, defamed the plaintiff, could not be treated as an allegation of a conspiracy to defame, and the Referee's order striking it out should not be interfered with.**

Appeal by the plaintiff from an order of the Referee in Chambers striking out certain portions of the statement of claim.

N. F. Hagel, K.C., for the plaintiff.

H. Phillipps, for the defendants.

ROBSON, J.:—The action is for damages for false imprisonment and slander, and resembles that of Messervey v. Simpson, ante 531, the defendants being the same.

Paragraph 2 of the statement of claim alleges two causes of action for false imprisonment, one against the defendants Simpson and Nelles,, the other against the three defendants. The learned Referee directed that paragraph 2 be struck out, with leave to substitute allegations in separate paragraphs. While this may not have been necessary, I will not interfere with the discretion so exercised.

Paragraph 3 and the parts of paragraphs 4 and 5 struck out by the Referee were objectionable, for the reason mentioned by me in the Messervey case, and the Referee's order thereon must stand.

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The whole of paragraph 6 was struck out by the order in appeal. This paragraph alleges that the defendants Simpson and Nelles, in collusion with the other defendant, defamed the plaintiff. It occurred to me that this might be treated as an allegation of a conspiracy to defame, within Carrier v. Garrant, 23 C. P. 276; but one charge made in the paragraph seems to be levelled at the defendants Simpson and Nelles, and the other at the defendant Simpson. The paragraph is ambiguous as to whether the defendant the Thiel Detective Company is being sued or merely named as a party in collusion. The defendant company is entitled to have that cleared up. Moreover, I do not think that the mere use of the words "in collusion" sufficiently indicates to the defendants that they are being charged as members of a conspiracy to defame the plaintiff, if that were really the pleader's intention. I will not interfere with the Referee's order.

Amendments beyond those allowed by him may be proper, and that phase may be spoken to.

Costs in the cause to the defendant the Thiel Detective Company in any event.

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## SASKATCHEWAN.

BROWN, J. MARCH 20TH, 1912.

TRIAL.

### McGREGOR v. HEMSTREET.

*Mortgage—Action for Foreclosure — Default — Relieving against—1 Geo. V. ch. 12, sec. 7 (Sask.)—Application of —Parties—Costs—Sale instead of Foreclosure—Claim of Mortgagee — Amount Paid upon Prior Mortgage — Arrangement between Parties — Execution Creditors — Service of Judgment.*

Section 7 of ch. 12 of the statutes of Saskatchewan, 1910-1911, has reference only to proceedings taken before a Registrar of Land Titles; and does not authorise the relieving of a defendant in a mortgage action from the consequences of his default, upon payment of the amount actually in arrear.

Certain defendants in the mortgage action, against whom the plaintiff claimed no relief, were refused costs against the plaintiff; but, at their request, a judgment for sale instead of foreclosure was pronounced, upon their guaranteeing the costs.

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**The plaintiff (mortgagee) was allowed to add to his claim a sum paid upon a prior mortgage; and an arrangement made between the parties, when that mortgage was assumed by the principal defendant, was given effect to.**

**Personal service of the judgment on execution creditors of the principal defendant was ordered, they not having been made parties.**

An action upon a mortgage.

J. A. Allan, for the plaintiff.

H. G. W. Wilson, for the defendants.

BROWN, J.:—The only question at issue in this case is the arrangement arrived at by the parties when the defendant Hemstreet assumed the mortgage of the Canada Permanent Mortgage Corporation on the 19th March, 1907. The indorsement which was made at that time on the mortgage in question in this action does not, in my opinion, leave the matter open to any doubt. I find the arrangement to be that the defendant Hemstreet was to be credited on that date with $5,647.10, being the amount then due under the Canada Permanent mortgage, and that the $2,000 payment to be made on the 1st June, 1907, was to be abandoned, and the mortgage money, namely, $25,000, was, after crediting the $5,647.10 as aforesaid, to be paid in monthly instalments of $250 each, beginning with the 1st April, 1907. A payment of $4,030.91 was made on the 10th February, 1910, for which credit has been given in the plaintiff's claim, and at that time it was agreed that the monthly payments for the next twenty months should be reduced to $125 per month, instead of $250, as provided for in the mortgage. The plaintiff, on the 31st October, 1911, since the commencement of this action, paid the Canada Permanent Mortgage Corporation, on their prior mortgage, the sum of $930.20, and this amount should be added as of that date to the amount of the plaintiff's claim.

The defendant Hemstreet, relying on sec. 7 of ch. 12 of the statutes of Saskatchewan, 1910-1911, asks to be relieved from the consequences of his default, upon payment of the amount actually in arrear. I am of opinion, however, that that section can have reference only to proceedings taken before the Registrar of Land Titles, in view of the fact that the section names the Registrar of Land Titles as the person who shall tax the costs. It could never have been intended that he should tax the costs of an action brought in the Court.

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The defendants, who were represented by Mr. Wilson, other than the defendant Hemstreet, asked for their costs of defence against the plaintiff. As no claim was made against these defendants, they are not entitled to such costs; but, as they have asked for sale, and guaranteed, through their counsel, the costs of such sale, I will order a sale of the premises instead of foreclosure.

The order of the Court will, therefore, be, that the matter be referred to the Local Registrar to ascertain the amount due under the plaintiff's mortgage; and, in the event of such amount, together with the plaintiff's taxed costs, not being paid within three months from the date of the Registrar's certificate, that the property in question be sold, upon terms and conditions to be settled by the Local Registrar; such sale to be subject to the amount owing to the Canada Permanent Mortgage Corporation under their two mortgages which are registered against the said property; the proceeds of sale over and above the amount of the plaintiff's claim and costs to be paid into Court. And I direct that a copy of this order be personally served on Lawson & Jones Limited, the Bromo Fizz Company Limited, H. H. Mead, the George F. Bryan Manufacturing Company Limited, and Stirton & Dyer—all execution creditors of the defendant Hemstreet, but who are not made parties to this action.

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THE

# Western Law Reporter

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## MANITOBA.

DECEMBER 1ST, 1911.

COURT OF APPEAL.

### REX v. REDD.

*Criminal Law—Procedure—Postponement of Trial—Powers of Assize Judge—Recall of Order Postponing Trial—Production of Absent Witness.*

**A Judge presiding at the assizes has power, during the sitting, to recall his order postponing the trial of a prisoner till the next assizes and to order the trial to proceed, the absent witness, upon whose account the order for postponement was made, having been produced.**

Reserved case stated by METCALFE, J., as follows:—

"The prisoner Redd was indicted at the assizes at Winnipeg on the 24th October, 1911, for the murder of Frank Johnson, and pleaded 'not guilty.' On the 3rd November, 1911, an application was made on behalf of the prisoner to postpone the trial to the next assizes, on the ground that one James Chavis, a witness whose name was on the back of the indictment, was absent, and was a necessary and material witness for the prisoner. I postponed the trial to the next assizes, on the ground that such witness was absent, it not then appearing probable that the Crown could obtain the attendance of the said Chavis at this assize. On the 7th November, 1911, counsel for the Crown appeared before me, in the presence of counsel for the prisoner, and stated that James Chavis had been found, and produced him in Court.

"Upon notice to counsel for the prisoner, and counsel for the prisoner attending, I thereupon reconsidered my order



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postponing the case to the next assizes, and ordered the trial to proceed on Monday the 20th November, 1911, during the sittings of assize.

"The prisoner was, on Monday the 20th November, 1911, and Tuesday the 21st November, 1911, tried on the said charge and found guilty of murder.

"Was I right in proceeding with the case at this assize, having previously postponed it to the subsequent assize?"

The case was heard by HOWELL, C.J.M., RICHARDS, PERDUE, and CAMERON, JJ.A.

N. F. Hagel, K.C., for the prisoner.

R. B. Graham and H. P. Blackwood, for the Crown, were not called on.

THE COURT answered the question in the affirmative.

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## SASKATCHEWAN.

JOHNSTONE, J. MARCH 26TH, 1912.

### WRIGHT v. MACLACHLAN.

*Principal and Agent—Agent's Commission on Sale of Land —Oral Contract—Conflicting Evidence — Surrounding Circumstances.*

The plaintiff, by virtue of an alleged agreement made with the defendant, which was not in writing, claiming a commission of fifteen per cent. on all sales of lots in a subdivision, whether effected through the plaintiff or through other agents of the defendant or through the defendant himself. The defendant denied the agreement:—

*Held*, having regard to the conflict of evidence and the surrounding circumstances, that the plaintiff failed to establish the agreement.

Action for commissions on the sale of land.

J. M. Stevenson, for the plaintiff.

W. M. Rose, for the defendant.

JOHNSTONE, J.:—The plaintiff seeks to recover in this action $1,768.50, being the alleged balance due to him from the defendant on account of commissions earned by the

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plaintiff on sales effected of various lots in what is known as the Watrous McLachlan Sand Beach subdivision.

The plaintiff alleges that, by the arrangement entered into between him and the defendant, he (the plaintiff) is entitled to charge and to be paid a commission of fifteen per cent. on all sales of lots in the subdivision named, whether such sales were effected through the plaintiff or through the other agents of the defendant or through the defendant personally.

Certain sales of the property referred to were effected through different agencies to the value of $14,015 or thereabouts, as to which sales the plaintiff, it is conceded, was directly instrumental in effecting a portion, the commission on which amounted to $333.75. This sum was received by the plaintiff in cash either from the defendant or through deductions made by the plaintiff out of purchase-moneys passing through his hands, entries of which were made by him from time to time in the books of the defendant, then in the plaintiff's possession.

The agreement between the plaintiff and the defendant was a verbal one, and no one was present when it was made.

The defendant on the trial, in giving evidence, insisted, just as positively as did the plaintiff in giving his version of the arrangement, that the plaintiff, it was agreed, should be entitled to fifteen per cent. on such sales only as were due to the exertions of the plaintiff; that the plaintiff had no right to be paid, under the arrangement entered into, for sales effected through other agencies; that the plaintiff, it was agreed, should be paid on the basis of a ten per cent. commission on account of such sales with the additional commission of five per cent. for keeping the books of the defendant containing the accounts relating to the dealings with the subdivision.

The plaintiff's memory as to what was said on the occasion on which the alleged agreement was entered into was not at all satisfactory; in fact, it was defective as to nearly every important event where, to a certain extent at least, it would be expected that there would be some show of recollection.

Having recourse to the circumstances surrounding the dealings between the parties: the plaintiff at no time made a demand upon the defendant for commissions other than those received by him and hereinbefore referred to, entries

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as to which were religiously entered in the books of the defendant; and, moreover, the books contained no entries of commissions to which the plaintiff ultimately claimed to be entitled, that is, commissions other than those he got. In fact, no claim was made for payment of other commissions until after the relationship of principal and agent had been severed at the instance of the defendant, because of the conversion by the plaintiff to his own use of moneys of the defendant passing through the plaintiff's hands as the agent of the defendant.

On the facts I find for the defendant, and there will be judgment for the defendant with costs.

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## SASKATCHEWAN.

JOHNSTONE, J. MARCH 29TH, 1912.

TRIAL.

### CHIZEK v. TRIPP.

*Marriage—Breach of Promise—Damages—Costs.*

**In an action for breach of promise of marriage, tried by a Judge, the issues were all found in favour of the plaintiff, but damages were assessed at only $200, with costs, however, on the higher scale.**

Action for breach of promise of marriage, tried without a jury.

F. F. McDermid, for the plaintiff.

A. M. McIntyre, for the defendant.

JOHNSTONE, J.:—I find all the issues herein in favour of the plaintiff; but to say that the feelings of the plaintiff, through the refusal of the defendant to marry her as he had promised, were very much hurt, and that she had suffered in consequence in body and mind, would be exaggeration.

I am satisfied that the true condition surrounding the engagement was not disclosed. There were circumstances, I suspect, which if they had been made known might have rendered the promise to marry nugatory; but it was no part

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of my duty to delve into that which perhaps it was desirable to keep in the background.

I assess the damages to which the plaintiff is entitled at $200. She will also be entitled to costs of the action on the higher scale.

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## SASKATCHEWAN.

JOHNSTONE, J. MARCH 29TH, 1912.

TRIAL.

## RYAN v. GABRIEL.

*Fire—Setting out—Neglect of Precautions—Prairie Fires Ordinance—Injury to Property—Negligence—Damages.*

***Held***, upon the evidence, that a fire set out by the defendant on his farm on the 20th October, 1910, was started in a heavy wind, without the statutory precautions to prevent its spreading being taken; that the fire spread to the plaintiff's land and destroyed or injured his property; and that the defendant's carelessness was the cause of the plaintiff's loss.

Damages assessed at $1,250.

Action for damages for injury to the plaintiff's property by reason of fire set out by the defendant, as alleged.

W. A. Boland, for the plaintiff.

W. R. Parsons, for the defendant.

JOHNSTONE, J.:—After a careful examination of the evidence both for the plaintiff and the defendant, I have had little difficulty in arriving at the conclusion that the fire set out by the defendant on his farm on the 20th October, 1910, is the fire which ultimately destroyed the plaintiff's property, as alleged by the plaintiff in his statement of claim.

The defendant, for the purpose of getting rid of stubble in one of his fields, a field nearest the roadway, started a fire in the stubble, in a heavy wind, without first having taken the precautions prescribed by law to prevent its spread. The stubble was burnt off, and the defendant and his two sons left the field for the house for dinner. During the dinner-hour the fire started up again, presumably in some

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dead grass or rubbish on the roadside, and spread to and across the roadway unto the adjoining lands, and thence to the plaintiff's lands, injuring a portion of his property, and totally destroying other portions, of the value of $1,500 or thereabouts, as the plaintiff alleges, particulars of which loss and damage were delivered to the defendant.

With the exercise of slight precaution, this fire might have been confined to the defendant's lands; and in abandoning the field at the time he did, without having left some one in charge to look after the smouldering matter, he was guilty of gross carelessness. The efforts of one man alone in the proper place would, owing to the conditions, have been sufficient to have averted the trouble.

It is unfortunate that more care is not observed in the setting out of fires for husbandry purposes by farmers. There were no less than three actions tried at the same sittings for damages sustained through fires started in this manner; and legislation seems to have availed but little in the suppression of prairie fires, which invariably prove so disastrous to the farmer.

The evidence as to the loss sustained in this instance by the plaintiff was not seriously disputed. No witnesses were called by the defendant to prove the loss less than that alleged by the plaintiff. After making some allowances on items as to which, it appears to me, some reduction should be made from the values as fixed by the plaintiff, I assess the damage sustained at $1,250.

There will be judgment for the plaintiff for that amount and costs.

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## SASKATCHEWAN.

BROWN, J. MARCH 29TH, 1912.

TRIAL.

## WILKERSON v. McGUGAN.

*Arbitration and Award—Building Contract—Misconduct of Arbitrator — Lack of Impartiality — Opportunity of Adducing Evidence not Given—Award ultra Submission —Removal of Arbitrator—Action—Costs.*

The submission to arbitration contained in a building contract was: "In case of dispute as to the manner in which the house is completed, R. C. McG. shall be referee to decide fairly what is just and right between the builder and the purchaser, and the builder and purchaser shall abide by and carry out R. C. McG.'s decision." Under this, the referee named proceeded, but did not provide for a hearing or the calling of witnesses; he conferred with each of the parties separately, and, after interviewing some experts and viewing the premises, he made his award:—

*Held*, in an action by one of the parties to the arbitration against the other party and the referee, that the award must be set aside, because: (a) the referee, though he had not acted in collusion with his co-defendant, had not acted impartially, having advised the agent of his co-defendant in regard to matters in dispute with the plaintiff; (b) the referee did not appoint a time to hear both parties on the matter in dispute and to take evidence if either party wished to adduce evidence; (c) the referee in his award went beyond the terms of the submission.

*Held*, also, that the referee should be removed.

*Held*, however, that no costs should be allowed to or against the referee, because, although he acted injudiciously, he tried to deal fairly; but the plaintiff should have his costs against the other defendant, without witness fees and with a limited counsel fee.

Action by Hannah Louise Wilkerson against R. C. McGugan and James C. Gaston t,o set aside an award.

F. W. Turnbull, for the plaintiff.

G. F. Blair, for the defendants.

BROWN, J.:—This is an action to set aside an award; and, although it is the duty of the Court to uphold an award where possible, yet in this case, for several reasons, the plaintiff must succeed in his action. I do not find that the referee, McGugan, acted in collusion with his co-defendant, but he did unquestionably act in a very injudicious manner. He took far too much interest in Gaston's behalf to act the part of an impartial referee. In framing, writing, and advising on the letter of the 29th July, 1911, which Craig,

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Gaston's agent, sent to the plaintiff, and generally prior to the award, McGugan seems to have acted as Craig's chief adviser.

Arbitrators or referees must observe the fundamental rules which govern judicial proceedings. They have judicial functions to perform; and, in the performance of their functions, they must not allow either side, unknown to the other, to use means of influencing their conduct or decisions: Harvey v. Shelton, 7 Beav. 455; Gregson v. Armstrong, 70 L. T. R. 106; Hudson on Building Contracts, 3rd ed., p. 755.

By acting as he did in this case, though not intentionally doing wrong, the referee was likely to become prejudiced in favour of his co-defendant. Gaston's agent was very much at fault in asking the referee so to act; and Gaston cannot, therefore, very well complain of the consequences of this action.

Again, the referee did not provide for a hearing or for the calling of witnesses. He simply conferred with the parties themselves separately, and then, after interviewing some experts and viewing the premises himself, he made his award.

It is contended, however, that in this case it was not contemplated by the parties that there should be a hearing or evidence taken, but that the referee had power, under the submission, to decide the matters in dispute on his own personal view of the premises. A study of the agreement does not permit me to agree with that contention. The agreement stipulates as follows: "The builder agrees with the purchaser to fully complete the said house on said lot on or before June 15, 1911, in such a manner that it will be completed for occupancy, fully in keeping with the kind and quality of the house as now standing, and in a manner satisfactory to the purchaser or his agent, and in case of dispute as to the manner in which the house is completed, R. C. McGugan, of Regina, shall be referee to decide fairly what is just and right between the builder and the purchaser, and the builder and purchaser shall abide by and carry out R. C. McGugan's decision." By virtue of this provision, the house was to be completed in keeping with the kind and quality of the house "as now standing;" and I fail to see how the referee could know how the house stood at the time of the agreement without evidence being offered or a hearing of some kind had, and he could not arrive at a

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just decision without knowledge on that point. It is true that the evidence of McGugan would indicate that he had casually observed the house before the date of the agreement, but not that he made a careful inspection; nor does it appear that the parties to the agreement were aware even of his casual observations, at the time of the making of the agreement.

I am, therefore, of opinion that the referee should have appointed a time to hear both of the parties on the matters in dispute and to have taken evidence with reference thereto if either party wished to adduce evidence.

It was also, in my judgment, clearly objectionable for the referee to interview builders or experts in the absence of the parties to the dispute, and to get evidence from them as to what was customary or proper under the circumstances.

Again, the referee undertakes to decide many matters which the agreement does not contemplate him doing. It calls upon him to decide, and to decide only, what was necessary on the part of the builder to do in order to complete this house; but he goes further, and reserves the right, in default of the builder doing it, to authorise the purchaser to get it done, and further, to authorise the custodians of the mortgage to deduct the cost of getting it done. In addition to all that, he stipulates that the builder shall not be freed from his obligations until he (the referee) approves of the manner of doing the work so ordered. I cannot see that there is anything unreasonable in these stipulations, but they are, in my judgment, clearly outside of the submission; and the award to that extent would be bad.

For the first-named reasons, however, the award must be set aside in toto; and I think also, under the circumstances, it is better that the referee should be removed. He himself by his pleadings assented to this being done. The counterclaim must be dismissed, as no cause of action can arise under the counterclaim until a proper award has been made. If the parties cannot agree upon a suitable referee, either party shall have leave to apply in Chambers to have one appointed.

I may add that it is with regret that I have been compelled to reach this conclusion, because the award, with some slight exceptions, seems to me to have been reasonably fair to the parties, and the result is an expensive litigation to very little purpose.

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I will not allow any costs for or against the referee, because, although he acted in some respects very injudiciously, yet, as I have already intimated, I am satisfied that he tried to deal fairly in the matter. In this connection see Haigh v. Haigh, 31 L. J. Ch. 420; Mosely v. Simpson, L. R. 16 Eq. 226; Chicot v. Lequesne, 2 Ves. Sr. 315; Lonsdale v. Littledale, 2 Ves. Jr. 720. The plaintiff will have his costs against the defendant Gaston both on the claim and counterclaim; but, as the greater portion of the time at the trial was occupied with the finding of the referee as to the work to be done, which, as I have already stated, seems to me to be reasonably fair, and likewise most of the witnesses called on the same matter, I will not allow any witness fees, and the counsel fee to the plaintiff will be fixed accordingly.

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## SASKATCHEWAN.

JOHNSTONE, J. MARCH 29TH, 1912.

TRIAL.

### SKLARINK v. WHITEHOUSE.

*Fire—Injury to Property—Evidence—Cause of Fire.*

**The plaintiff suffered serious damage from a prairie fire, one or other of two which started in the direction of the defendant's land to the west, and spread east to the plaintiff's farm and destroyed his crop:—**

***Held*, upon the evidence, that it was not proved that the fire kindled by the defendant on his land was that which caused the plaintiff's loss; and the plaintiff's action for damages was dismissed.**

Action for damages for injury to the plaintiff's property from fire negligently allowed to spread from fire set out by the defendant, as the plaintiff alleged.

C. D. Livingstone, for the plaintiff.

J. A. M. Patrick, for the defendant.

JOHNSTONE, J.:—There can be no question whatever but that the plaintiff suffered serious damage from a prairie fire, one or other of two which started in the direction of the de-

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fendant's lands to the west, and spread east to the plaintiff's farm and destroyed his crop; but I may say that I have had the greatest difficulty in arriving at a conclusion satisfactory to myself as to which fire—that kindled by the defendant on his lands, or that started on the farm of Gabora—caused the plaintiff's loss. I find as a fact that there were two fires burning on Saturday the 29th October, 1911, the day on which the damage was sustained by the plaintiff to his grain, one of these kindled by the defendant for the purpose of backfiring to save his property from a fire raging to the north and coming in the direction of his farm. It is not necessary that I should find who was responsible for this fire to the north, but I imagine it was the witness Gabora. He was said to have started a fire on the morning of the 29th; in fact, he said to one Smeed that he had so started fire. These fires merged on the farm of the defendant, or quite adjacent to it on the farm of Gabora, one going with the wind—the north fire—and the other to the north and east to the defendant's ploughed ground on the east, and one or both east in the direction of the plaintiff's premises, ultimately terminating at the lands of the plaintiff, destroying his crop. There is a conflict of testimony as to whether or not the fire started in the direction of Gabora's farm, which came south, really reached the defendant's premises. Several witnesses were called by the plaintiff who positively stated that they had made an examination of the ground after the fire, and that there was an unburnt stretch between the fires of at least ten paces; that owing to sparsity of grass at that point the north fire had burnt itself out. This unburnt stretch, however, according to the plaintiff and two witnesses, was not to be seen on the Tuesday following. There was then no such stretch of unburnt grass; if it had ever existed at all except in mind, it had been burned over in the interval—inferentially at the instance of the defendant —for no other purpose, of course, than that of destroying the only existing visible evidence of the fact that the fires had not come together; the defendant and his witnesses having stated as a fact that they had. These are the only persons who were on the spot and could have actually seen whether or not the fires had or had not run into each other. If the north fire had not burnt itself out, the person who started that fire, and not the defendant, is responsible to the plaintiff, unless the backfiring of the defendant got out of

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control of the defendant and his men and made its escape and ran east before the north fire reached the space burnt over by the defendant's fire.

There is no disputing the fact that the defendant, to save his property, started to backfire in the field across the road from Hyshka's house. He and four, at least, of his witnesses say that that fire was burning fiercely to the north, with the wind blowing from the north-west to south of east, when the defendant commenced to backfire; that, whilst backfiring on section 17, the defendant's section, the fire from the north came south around a slough, and thence east to the plaintiff's, north of some ploughed ground of the defendant and north of the defendant's fire and buildings. None of the plaintiff's witnesses saw the fire to the north, but say they saw the defendant's fire spread to the east and in the direction of the plaintiff's lands, and one or two say positively that this is the fire which did the damage. Under these circumstances, it may be conceded that the task of arriving at a satisfactory solution of the cause of the trouble is not an easy one.

I am convinced, from the direction the fire from the north was taking, and the situation of Hyshka's house, and the distance to the house of the defendant, and owing to the great volumes of smoke caused by both fires, that the view of those at Hyshka's house was more or less obscured, obscured to such a degree as to render a view from that point of what was going on in the direction of the plaintiff's and defendant's premises impossible, or at any rate to render uncertain and unreliable any statements to the effect that the defendant's fire did the damage.

Moreover, to find the defendant guilty of setting the fire which caused the damage would be to impeach several evidently very respectable English-speaking persons of education and good standing in the community, and, from appearances, persons who, in my judgment, would not commit wanton perjury. I rather incline to the opinion that the Hyshkas were, for the reasons mentioned, mistaken as to what did actually occur on the afternoon in question.

I may say further that the fire of the defendant did not get out of control, or it would have destroyed his own property.

In my judgment, the plaintiff's action should be dismissed.

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## MANITOBA.

PRENDERGAST, J. APRIL 1ST, 1912.

TRIAL.

### McLAWS v. WELLBAND.

*Solicitor—Authority of Client—Disbursements — Evidence.*

***Held*, upon the evidence, that the plaintiff had authority from the defendant, as the defendant's solicitor, to pay off two judgments recovered against the defendant, and was entitled to recover the amounts paid.**

In June, 1908, the plaintiff, who was acting as solicitor for T. R. Wellband, paid two judgments, one for $500 and another for $805, which had been recovered by the Colonial Investment Company and William Smith against the defendant, and he registered discharges of the judgments.

The plaintiff alleged that he made these payments under the implied authority of doing all legal business for the defendant, and also under a request made in correspondence between the parties. Certificates of these judgments had been registered, and they were paid off so as to enable Wellband to transfer properties which he desired to do.

The plaintiff had received $450 on account of the payments made, and the defendant denied his liability for the balance, on the ground that the plaintiff had no authority to pay the judgments in question.

G. A. Elliott and M. G. Macneill, for the plaintiff.

C. P. Fullerton, K.C., and J. P. Foley, for the defendant.

PRENDERGAST, J.:—Considering the general course of dealings between the parties, the correspondence between them, the date of the discharges and of the transfer of the Beverley street property, I have come to the conclusion that there was authority on the plaintiff's part to pay the judgments in question.

There will be judgment for the plaintiff as claimed, with costs.

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## MANITOBA.

MATHERS, C.J.K.B. APRIL 2ND, 1912.

TRIAL.

# BRANDON ELECTRIC LIGHT CO. v. CITY OF BRANDON.

*Municipal Corporations — Waterworks — Appropriation of Water by Consumer without Payment — Absence of Record of Amount Taken—Presumption — Settlement with Committee of City Council—Cheques Given in Payment—Failure of Attempt to Establish Fraud, Duress, Undue Influence, Extortion, or Absence of Consideration —Waiver — Pleading — Ratification of Settlement by Council — Counterclaim — Unpaid Cheques — Amendment — Costs — Statutory Limit — Discretion — 7 & 8 Edw. VII. ch. 12, sec. 1.*

The defendants, a municipal corporation, owned waterworks, and supplied the plaintiffs, among others, with water for the purpose of generating power. The plaintiffs paid for the water according to the amount used, as measured by a meter placed on the supply pipe. The plaintiffs, however, by means of a pipe connected with the defendants' service pipe above the meter, were able to use and did use unmetered water for some years. The existence of this pipe was ultimately discovered by the defendants' servants. The plaintiffs offered to settle for the water that had been used. A meeting of the waterworks committee of the defendants' council was held, all the members of the council attending, for the purpose of making a settlement. The members unanimously agreed to ask the plaintiffs to pay $13,778, though a smaller sum was thought by the majority to be sufficient. The plaintiffs' manager assented to the larger sum, a bill for water used to that amount was presented, and payment was made on that basis, by a number of cheques, some of which, amounting to $6,778, were paid. Payment of the cheques representing the balance was stopped, and the plaintiffs sued to recover the cheques and part of the amount which they had paid:—

*Held*, that, as the plaintiffs had gone on for years deliberately appropriating the defendants' water without preserving any record of the quality so taken, the maxim *omnia præsumuntur contra spoliatorem* must be applied and every presumption made against the defendants.

*Lamb* v. *Kincaid*, 38 S. C. R. 516, applied and followed.

*Held*, also, that the plaintiffs had failed to shew that they were induced to give the cheques by fraud, duress, undue influence, or extortion of the defendants, or that the consideration therefor was void or had failed.

*Held*, also, that, if there had been any evidence to support a finding of fraud or duress, the plaintiffs had, by the voluntary payment of five successive cheques, maturing during five months, waived their right to rescind.

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*Held*, also, that the plaintiffs, by their pleading, had deprived themselves of the right to urge that the settlement was made only with a committee of the council, and was never adopted by the council; paragraphs 7 and 8 of the statement of claim being to the effect that the plaintiffs admitted that the account for $13,778 for unmetered water was rendered by the defendants to the plaintiffs, and that the cheques were given by the plaintiffs to the defendants. If evidence by ratification by the defendants were necessary, the receipt and retention of the proceeds of the six paid cheques would supply it.

*Held*, also, that the defendants were entitled to judgment upon a counterclaim for the amount of the unpaid cheques; and they were allowed to amend their pleading.

*Held*, also, that the case was of "special importance or difficulty," within the meaning of 7 & 8 Edw. VII. ch. 12, sec. 1; and the costs of the defendants should be taxed without regard to the statutory limit of $300.

Action to recover $2,000 paid and for repossession of seven unpaid cheques given in the circumstances set out in the judgment.

C. P. Wilson, K.C., and J. F. Kilgour, for the plaintiffs.

J. E. O'Connor and S. H. Mackay, for the defendants.

MATHERS, C.J.K.B.:—Since 1896, the plaintiffs have carried on the business of producing and supplying electric current for lighting and power purposes, generated partly by means of a steam plant and partly by water power. The defendants own their waterworks, and for the purposes of their steam engines the plaintiffs received water from the defendants. Up to 1903 the plaintiffs had what is known as a "flat rate." A 2-inch upright service pipe ran from the defendants' main through the floor of the plaintiffs' powerhouse. From this 2-inch pipe the plaintiffs took away two 1-inch pipes, one of them just beneath the floor, and the other above the floor. The former was connected with a suction-pipe which connected with an engine-pump and also with a large tank and the other with another tank. About the 1st June, 1903, the defendants abandoned the flat rate system of charging for the water used by their customers, and adopted a measured service rate. For the purpose of measuring the water supplied to the plaintiffs, the defendants, about that time, installed a meter on the plaintiffs' supply pipe. This meter was placed above the floor, and from the meter the plaintiffs took a 2-inch pipe which ran above the floor to the rear basement, and from which branched three 1-inch pipes to three several pumps. When this was done, the pipe below the floor was not removed—I surmise

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because of the defendants' official had then no knowledge of its existence. The plaintiffs went on using this pipe below the floor, when it was necessary to do so, for about a year. It was then disconnected from the suction-pipe, but the valve was left, and a nipple for a hose connection was put on. It remained in this condition until about the end of 1907 or the beginning of 1908, when the chief engineer, Moring, connected it up with a 1-inch pipe which ran through to one of the tanks. On the 28th November, 1910, the existence of this pipe was discovered by the defendants' officials, and the city engineer was notified. The official who discovered it states that the valve which regulated the flow of water into it was then two-thirds open. He left it in the condition in which he found it, and notified the city engineer, who, with the city foreman, went there and examined the pipe and found it as described. The mayor was notified, and he communicated with Mr. Patterson, the plaintiffs' manager, and told him what he had been informed. The latter denied that any such pipe was in existence. Moring, the chief engineer, was absent; but the manager says that the same evening he spoke to Stanley, the second engineer, who informed him that there was a pipe there. He was directed to take it out, and that same night Stanley took out a 5-foot length of the pipe that ran from the valve to an elbow, where it connected with the straight pipe running to the tank. He also plugged up the valve and took off the valve wheel. The next day, viz., the 29th, the city engineer called upon Mr. Patterson and asked him about this pipe, but the latter denied that any such pipe was in existence. He was asked by the engineer to go with him and he would shew him it, and they went into the pit, but discovered that the 5-foot length was gone. The manager denied that any such pipe had ever been in existence, and asserted that it had been plugged as it then was "for years and years." When asked where the pipe ran to, he denied all knowledge of where it ran to, but when told by the engineer that he would pull up the floor of the building and find out, he then informed him that it ran to the tank. At the time of this interview, the manager was not aware that the engineer had been to the works the day before and had seen the pipe.

The defendants obtained statutory declarations from two former employees of the plaintiffs to the effect that this pipe had been used for the purpose of running water into

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the tank, but took no further steps at that time with reference to the matter.

About the 6th December following, the manager was asked by a reporter of one of the newspapers for his version concerning a rumour on the street that the plaintiffs had been taking unmetered water. The manager at once went to Alderman Dowling, chairman of the waterworks committee, and said he came to see if he could arrange for a settlement, and offered to settle for the water that had been used. Dowling replied that he could not arrange any settlement with him unless he was prepared to admit that the plaintiffs had been taking water unlawfully. Patterson replied that he was prepared to admit that the plaintiffs were in the wrong. They both then went to the mayor and arranged to have called a meeting of the waterworks committee, to which all the members of the council would be invited.

The desire on both sides was to avoid publicity, in the interests of both the plaintiffs and the defendants, which could only be accomplished if all the members of the council consented. When the meeting convened, all members were present. The purpose of the meeting was to arrive at a settlement with the plaintiffs for the unmetered water they had taken. The mayor pointed out that the plaintiffs had a bond sale pending, and that there was an inspector at that time in the city looking over the plaintiffs' affairs, and that it would be injurious to the plaintiffs if a charge of this kind should become public. He also pointed out that it would do the defendants harm, and that it was in the interests of both that a settlement should be made without publicity. One or two members of the council thought a settlement should not be made, but that there should be a judicial investigation. However, on hearing the statement made by the mayor, they ceased to press for an investigation, and were willing to effect a settlement.

The engineer was asked to prepare a statement of the probable quantity of water used and its value at the rate paid by the plaintiffs, namely, 12½ cents per 1,000 gallons, and he did so. He averaged the meter readings for the three days immediately after the unmetered pipe had been disconnected, getting an average of 48,000 gallons per day. He assumed that that was the average used during seven



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and three-quarter years, during which the pipe was in existence. He also assumed that for 200 days in each year, the steam plant was operated. The total value of the water used at 12½ cents per 1,000 gallons would thus be $9,300. From this he deducted the value of the water which had passed through the meter and been paid for, viz., $2,679.98, leaving a balance of $6,620.02. As it appeared that the engineer had nothing definite on which to base his calculation, one of the aldermen said that, in his opinion, the defendants could only be protected by charging the plaintiffs for the full flow of that pipe at 40 lbs. pressure during the whole period from the time the meter was installed up to the time the pipe was removed, and asked the engineer to prepare a statement on this basis. He did so, assuming that the pipe was 100 feet long, and on this basis the value of the water amounted to $13,778. Three of the aldermen took the ground that this was the amount for which the plaintiffs should be charged. The majority of the members thought that the first estimate of the engineer was sufficient. However, as the minority refused to abate their demand for the full amount, the members of the council present unanimously agreed that they should ask for the larger amount.

The city solicitor had been called in and advised the council in favour of the policy of settlement. When it was decided to call in Mr. Patterson and ask for the larger amount, the solicitor warned them that they must make no threats, and advised that the accounts should be presented through the ordinary waterworks officials. In order to avoid the appearance of threat, it was decided that only one, either the mayor or the chairman of the committee, should be spokesman; that the engineer should present the account; and that the other members should say nothing. Mr. Patterson, the manager, was called in and stated his desire to settle. The engineer then told him the amount. The chairman, Alderman Dowling, asked him if he accepted the bill, and he replied that of course he accepted; if it were $30,000, he would have to accept it. Alderman McLean asked him if it were possible for him to have used that quantity of water, and he said it was not.

Considerable discussion took place then between the aldermen themselves, the majority arguing in favour of acceptance of the smaller bill, but the others standing firmly in favour of accepting only the larger amount. Mr. Patter-

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son was then asked to retire, but the discussion still continued. Finally Alderman Whillier left the room, stating as he was leaving that they must settle for the larger amount or they would hear from him, or there would have to be a public investigation, or something to that effect. As the minority would not yield to the views of the majority, in order that a unanimous decision should be come to, the majority agreed to accept the views of the minority and demand payment for the full flow of the pipe. This decision having been arrived at, it was decided that an account for the amount agreed upon should be presented to the plaintiffs for payment the next morning by one of the clerks in the waterworks department, and the mayor was appointed to take settlement.

Accordingly, on the 7th December, Patterson was presented with a bill for unmetered water, amounting to $13,778, by the waterworks collector, who asked him if he would pay the amount, and he said he would. It appeared that he afterwards represented to the mayor that the amount was a very large one to pay at once, and asked if it could not be extended over a year. For the purpose of deciding this point, the mayor called another meeting of the members of the council on the 8th December. All members were present at this meeting except Aldermen Dowling, Whillier, Clark, and Coleman, and it was agreed to accept as payment $1,778 cash and twelve cheques for $1,000 each, maturing over a year, a month apart. At this meeting the mayor told Patterson what the attitude of the minority had been at the other meeting, and that they would not consent to a settlement for anything less than the full amount. One or two of the aldermen urged Patterson then not to give the cheques, and said he was a fool to do so, but he went on and signed and handed over the cheques to the mayor. These were handed to the city treasurer, who, as the cheques matured, handed them to the waterworks collector for collection.

The first cheque for $1,778 was paid, as were also five of the monthly cheques given. The plaintiff company on the 28th June, 1911, notified the bank to refuse payment of the additional cheques. On the 3rd July, the city council referred the matter "of the stoppage of payment of the postdated cheques deposited with the treasurer" by the plaintiffs "to the finance committee to discuss the matter with Mr. Patterson and report at a subsequent meeting of coun-

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cil." Alderman Hughes, the chairman of that committee, made an investigation of the plaintiffs' books and prepared a report, dated the 17th March, 1911, which was assented to by the finance committee, that the amount already paid by the plaintiffs upon the cheques "represents an amount much in excess of the price of the quantity of water which could possibly have been used by the company from the pipe in question," and recommends "that the amount already paid by the company be accepted in full settlement of all claims against the company in respect of the said matter, and that the city solicitor be instructed to return the balance of the cheques to the company." This report was, by resolution, adopted by the council on the same day, but was not acted upon.

On the 4th December, 1911, the company commenced this action to recover possession of the seven unpaid cheques, and also to recover back $2,000 of the money already paid. The ground of the action is, that the cheques were procured by the defendants in circumstances amounting to fraud, duress, undue influence, and extortion, and upon void and illegal consideration and a consideration which failed.

On the 29th December, 1911, the defendants' city council, by resolution, unanimously rescinded the said report of the finance committee dated the 17th November, and of the resolution adopting it.

I find that, when the meter was installed by the defendants, the pipe in question was connected with the city service pipe underneath the floor, and was not then disconnected, because the officials performing the work were not aware of its existence. The plaintiffs' servants continued to pass water through this pipe as they required for about one year. At this time the pipe communicated with a suction pipe. It was then removed from the suction pipe and a nipple and hose connection put on. Water was taken to the tank from this pipe by means of a hose from time to time as required, until about the end of 1907 or the beginning of 1908, when, as before stated, the chief engineer of the company himself installed an iron 1-inch pipe running through to the tank, and after that date water was used through this pipe.

I find that the fact that water was being used through this pipe was known to the engineers and servants of the company, and was also known to the manager, Mr. Patterson. At the trial he denied on oath that he had any know-

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ledge of the existence of this pipe. His evidence on that point appeared to me utterly improbable; but, when taken in connection with the surrounding circumstances and his own conduct after it was discovered by the defendants, and the evidence of Stokes, I have no hesitation at all in finding that water was used through this pipe with his entire knowledge and concurrence. It would be remarkable if the existence and use of this pipe was known to everybody employed around the works with the exception of the active manager.

After the defendants' officials had discovered that the plaintiffs had been clandestinely taking water by means of the pipe in question, the plaintiffs' manager became alarmed at the consequences to the plaintiffs' credit and reputation if the fact should become public, and possibly from the fear that the plaintiffs might be publicly charged with stealing water. In order, if possible, to prevent this, he went to the defendants to procure a settlement of the claim, which he knew the defendants had against the plaintiffs. His purpose could only be accomplished by a secret settlement, and he requested that the facts be not made public. The mayor and aldermen were quite prepared to meet his wishes as to secrecy, both for the sake of the plaintiffs and the defendants, and were also willing to accept payment for the water wrongfully used; and the only point on which there was any divergence of opinion was as to the means of arriving at the quantity so used. There was not then, and is not now, any known means of ascertaining, with even approximate accuracy, the quantity of water improperly passed through this pipe. When the aldermen met on the 6th December, at the plaintiffs' request, to discuss a basis of settlement, they had before them nothing but the bald facts that this pipe had been in existence since 1903, and that it had been used by the plaintiffs. They had no information as to the extent of such user. Mr. Patterson knew, or had the means of knowing, whether or not it had been in constant use; but he chose to assume the attitude of entire ignorance, and offered no information to aid the aldermen to a conclusion. The plaintiffs had gone on for years deliberately appropriating the defendants' water without preserving any record of the quantity so taken. In such a case, the maxim omnia præsumuntur contra spoliatorem must be applied and every presumption be made against the plaintiffs.

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The principle applicable is well illustrated by the case of Lamb v. Kincaid, 38 S. C. R. 516. There a quantity of auriferous material was taken from the disputed and undisputed portions of a mining claim by the defendant, who intermixed the products without keeping any account of the quantities taken from these portions respectively, and appropriated the gold recovered from the whole mass. The Court held the defendants accountable for as much of the mixed products of the two claims as they did not strictly prove to have come from their own. Duff, J., at p. 541, speaks of this as a "long-settled doctrine of English law." Again, at p. 540, he says: "The Court is not called upon to speculate in such a case for the benefit of deliberate wrong-doers; they come within the wholesome rule that if a man by his deliberately tortious act destroys the evidence necessary to ascertain the extent of the injury he has inflicted, he must suffer all the inconvenience which is the result of his own wrong" —citing the well-known leading case of Armory v. Delamirie, 1 Strange 505.

Lamb v. Kincaid was a case not of destroying evidence but of not preserving evidence of the extent of the wrong done. In that respect, it applies exactly to this case. The plaintiffs have tortiously taken the defendants' water without preserving any record of the quantity used. Prima facie they were bound to pay for the full flow of the pipe for the entire period. Those members of the city council who took this stand were, in my opinion, but asserting the strict legal right of the defendants. If the plaintiffs did not want to accede to this demand, the onus was upon them to shew by undoubted evidence that the full flow of the pipe had not been used. There was nothing extortionate on the part of the defendants in claiming $13,778. In arriving at that amount, the engineer had assumed that the pipe was 100 feet long, and that the pressure was 40 lbs., but he had charged only 12½ cents per thousand gallons, which is a special manufacturers' rate. The rate fixed by the city by-laws for general consumption was much in excess of this. The plaintiffs would have no right to claim the benefit of a special rate granted them for metered water, for water surreptitiously taken, and the defendants would have a perfect right to charge them for water so taken at the general rate fixed by their by-laws. Calculated at the by-law rates, the value of the water the pipe was capable of carrying

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would be $23,409. The pipe, however, was not over 50 feet long, and the pressure was probably not more than 30 lbs. The value of the water the pipe was capable of passing on this basis, even at the special rate of 12½ cents, would be $16,689, and at the general rate would be $27,600. So that it does not appear that the defendants made their claim anything like as large as they might have made it with perfect propriety.

When the amount which the defendants asked was mentioned to Mr. Patterson at the meeting on the 6th December, and he was asked if he would accept it, he said that of course he would accept it; he would have to do so if it were $30,000. He neither tendered nor offered to tender any evidence that the quantity of water charged for had not been used. He did say, before leaving, in response to one of the aldermen, that it was not possible for the plaintiffs to use that quantity of water, but he suggested no method by which the quantity could be more accurately arrived at. Indeed he gives as the reason for his delay in stopping payment of the cheques that he was not earlier in possession of data from which to calculate even the ultimate quantity of water used.

When the account was presented to him the next day, he again promised to pay it, and he telephoned the city engineer to ask about the odd $778, as he had understood the amount was even $13,000. On the 8th, when he signed and handed over the cheques to the mayor, he was subjected to no pressure or duress to do so. Dowling and Whillier, the leaders of the minority, were not present. Even Fleming, who had favoured an investigation, urged him not to give the cheques, as also did some others. He knew that a large majority of the council, including the mayor, were in favour of accepting in settlement $6,600, the first estimate of the city engineer. He must be taken to have known that, if the matter were allowed to take the usual course, the majority could enforce their views on the minority. Such a course, however, would involve exposure and probably public discussion of the plaintiffs' conduct in the council, and in the press; and, in order to stifle publicity, he was willing to pay the amount asked. I am satisfied that those members of the council who refused to consent to any settlement for less than $13,778, acted with perfect bona fides, and in the honest belief that in no other way could the defendants' interests be fully protected. There was no disposition on the part of

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either the mayor or any of the aldermen to take advantage of the position in which the plaintiffs found themselves. The evidence entirely fails to establish fraud, duress, or extortion on the part of the defendants.

It is contended, however, that the cheques were given in circumstances which in law amounted to equitable duress or undue influence. In support of this contention Smith v. Cuff, 6 M. & S. 160, was relied upon. That was the case of a creditor who refused to execute a composition deed with his debtor unless the latter gave him notes for the balance of his claim and threatened a commission in bankruptcy. The debtor gave the notes, which were transferred to an innocent party, and afterwards paid by the debtor, who then sued the creditor for the amount so paid. In argument counsel for the debtor put the case upon the ground that it was a fraud upon the other creditors. The defendant's counsel admitted the principle, but urged that the plaintiff could not recover, as he was in pari delicto. Lord Ellenborough, in answering the defendant's argument, said: "This is not a case of par delictum; it is oppression on one side and submission on the other; it could not be predicated as par delictum when one holds the rod and the other bows to it." And he concluded by saying that there was no case where money having been obtained "extorsively and by oppression and in fraud of the party's own act as regards the other creditors, it has been held that it may not be recovered back." It appears quite clear that the basis of the decision was the fraud upon the other creditors. It would hardly be suggested that a sole creditor who refused to compound with his debtor and insisted upon payment of the full claim under threat of bankruptcy proceedings would be compelled to refund what he had received over and above the composition offered. If the defendant in Smith v. Cuff had openly made his execution of the deed conditional on being given notes for the balance of his debt, and the other creditors had executed it with knowledge of such condition, he could not have been compelled to refund the amount collected. In my opinion, Smith v. Cuff has no application to the facts of this case. Here the plaintiffs had, by their own misconduct, brought about a situation fraught with danger to their credit and reputation. In order to escape from this situation, the plaintiffs approached the defendants with a proposition that they should pay. The defendants stated

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an amount which they were willing to accept. The method of computation adopted by the defendants was logically and legally sound; and the plaintiffs agreed to pay the amount. It is but the case of one party making a claim upon another in the existence and amount of which he has an honest belief, and the other party agreeing to pay it without further investigation. In such circumstances, all that a court of justice has to do with respect to the agreement arrived at by the parties is to ascertain that it has been bona fide made. If so made, a court of justice ought to respect it and not allow it to be questioned: Dixon v. Evans, L. R. 5 H. L. 606. And that is so, even although the claim put forward turned out afterwards to be wholly unfounded: Callister v. Bischoffsheim, L. R. 5 Q. B. 449, and Cook v. Wright, 1 B. & S. 559.

The plaintiffs have, therefore, in my opinion, failed to shew that they were induced to give the cheques in question either by the fraud, duress, undue influence, or extortion of the defendants, or that the consideration therefor was either void or has failed.

The other grounds of action alleged in the statement of claim were not supported by the evidence and were not pressed in argument.

Even if there had been any evidence to support a finding of fraud or duress against the defendants, the plaintiffs have, by the voluntary payment of five successive cheques maturing over five months, waived their right to rescind: Doll v. Howard, 11 Man. L. R. 577; Halsbury's Laws of England, vol. 7, p. 357; and Ormes v. Beadel, 2 De G. F. & J. 333. The plaintiffs' bond sale was consummated before the end of the year, when all reason to apprehend financial embarrassment from an exposure was removed; yet the plaintiffs went on and paid a cheque for $1,000 on the last day of each of the following months of January, February, March, April, and May. It seems to me idle to contend that, after such an unequivocal affirmation, they have a right to attack the transaction.

It is said, however, that the settlement was made only with a committee of the council, and that the agreement never was adopted by the council. I think the plaintiffs, by their pleading, have deprived themselves of the right successfully to urge this objection. By paragraphs 7 and 8 of the statement of claim, the plaintiffs admit that the

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account for $13,778 for unmetered water was rendered by the defendants to the plaintiffs, and that the cheques were given by the plaintiffs to the defendants. Supplying of water and collecting the charges therefor is part of the defendants' regular routine business. When an account for water has been presented and cheques given in payment therefor, it would be singular if the defendants could not retain and collect such cheques without shewing that they had been formally accepted by the council. They were in this case accepted by the mayor with the concurrence of the whole council, and handed by him to the proper official, the treasurer, who from time to time handed them out for presentation at the bank. The mayor, for some reason not apparent, warned the treasurer that he gave no instructions with respect to the cheques. No instructions, however, were necessary. Having received them as payment of a water account, it was his duty to collect them, and he proceeded to do so. If evidence of ratification by the defendants were necessary, the receipt and retention of the proceeds of the six paid cheques would supply it.

It was admitted that the adoption by the city council of the finance committee's report of the 17th November affords the plaintiffs no ground of action against the defendants. Such report does, however, as was contended, afford evidence for the plaintiffs of the quantity of water which the company's works were capable of consuming. For the purpose of considering the validity of the settlement arrived at, it is not the facts which subsequent investigation, conducted by the defendants, brings to light that are to be looked at, but the facts and information present to the minds of the aldermen when the agreement was arrived at. Besides, the report pretends to take account only of the water which the plaintiffs would properly consume in the operation of their plant. There is always the possibility that that pipe may have been carelessly allowed to run when the steam plant was not in operation. While this may be regarded as an improbability, it was still a possibility which might reasonably operate on the minds of the aldermen.

In my opinion, the plaintiffs' action fails and must be dismissed.

The defendants have counterclaimed for $7,000 balance due for unmetered water taken.

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It follows from what I have said that the defendants would be entitled to judgment for the unpaid cheques if they had counterclaimed therefor. The defendants' counsel asked leave to amend, and I think the leave ought to be given.

The defendants also asked leave to amend as indicated in notices of motion dated the 11th and 15th January, 1912, to which the plaintiffs ask leave to reply as indicated in a notice dated the 5th February, 1912. I allow both amendments.

The plaintiffs' action will be dismissed with costs; and, upon the defendants amending their counterclaim so as to make it a claim upon the unpaid cheques, there will be judgment for the defendants upon the counterclaim for $7,000 without costs.

I think this is a case of "special importance or difficulty," within the meaning of 7 & 8 Edw. VII. ch. 12, sec. 1; and, in the exercise of the discretion conferred upon me by that Act, I allow costs to be taxed without regard to the statutory limit of $300. I also grant a fiat for costs of examination for discovery.

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## SASKATCHEWAN.

BROWN, J. APRIL 2ND, 1912.

TRIAL.

## MITCHELL v. WILSON.

*Vendor and Purchaser—Contract for Sale of Land—Determination by Vendor—Recovery by Purchase of Sum Paid—Deposit or Payment on Contract—Improvements Made by Purchaser—Recovery of Sums Expended as Damages—Unjustifiable Determination—Delay—Time.*

The plaintiff agreed to purchase a lot of land from the defendant for $1,350, and paid him $200 in cash, for which the defendant gave him a receipt. The arrangement was, that the plaintiff would (ten days' later) give two promissory notes to the defendant for $200 each, and pay the balance out of the proceeds of a loan which he (the plaintiff) expected to get upon the security of the lot. The plaintiff went into possession and paid $59.45 for some alterations in the building upon the lot to make it suitable for his business, as the

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defendant knew. He also paid the defendant $75 in cash for a stable which was on the back of the lot. The plaintiff did not obtain the loan; and the defendant, after waiting for six days beyond the ten days, and not receiving the notes, went into possession of the lot and subsequently resold it:—

*Held*, that the plaintiff was entitled to recover the $200, the $59.45, and the $75.

On the evidence, the $200 was a payment on the contract, and not a mere deposit. The plaintiff's delay was not to be regarded as an abandonment or a repudiation. The defendant, by entering and reselling, had determined the contract; and there was no obligation on the plaintiff to come forward with the balance of the purchase-price.

*March Brothers & Wells* v. *Banton*, 45 S. C. R. 338, *ante* 322, followed.

Time was not made of the essence of the contract, and it did not appear from the nature of the contract and the surrounding circumstances that such was the intention of the parties. Either party might, by a proper notice, bind the other to complete within a reasonable time to be specified in such notice; and the defendant did not give a reasonable time. The delay of the plaintiff could not be regarded as an undue and unjustifiable delay. The contract was, therefore, unjustifiably determined by the defendant, and as a result he was liable in damages.

The improvements made by the plaintiff having been contemplated by the parties at the time of the contract, and being the fair consequence of the contract, the plaintiff was entitled to recover as damages the amounts expended.

Action to recover three sums of money paid by the plaintiff under a contract which was rescinded.

F. L. Bastedo and E. J. Moon, for the plaintiff.

H. M. Allan, for the defendant.

BROWN, J.:—I prefer to accept the plaintiff's version of what took place in connection with this transaction. Not only did the plaintiff impress me favourably as a witness, but his version is much more likely, and is more in harmony with the documentary evidence, so far as that evidence goes. The facts as I find them are briefly as follow:—

The plaintiff, a stranger in the village of Radville, was desirous of securing some property on which to open up business as a merchant-tailor. The defendant held lot 4, block 4, in that place, under an agreement of sale on which there was still owing some $1,000 and interest. On the 7th May, 1911, the defendant approached the plaintiff and offered to sell him this lot for $1,350, and the plaintiff said he would take it, provided he could get it on easy terms, as he had only $400 cash. The defendant suggested to the plaintiff the advisability of getting a loan on the property, with the view, I take it, of paying him (the defendant) in full and getting title in his (the plaintiff's) own name. The plaintiff, before entering into any contract, in an effort to carry out this sug-

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gestion, went to Weyburn, where he met one McCaig. McCaig stated that he thought he could get him about $800 by way of a loan on this property, and would let him know definitely in ten days' time. The plaintiff then went back to Radville, and on the 9th May again saw the defendant and informed him that he could only get $800 on the property by way of loan. It was then agreed that the plaintiff would pay $200 cash, and in ten days' time would give two notes for $200 each, payable in three and four months respectively, and the balance of the purchase-price was to be arranged, both parties at that time anticipating that by the expiration of the ten days word would have been received from McCaig with reference to the loan. The plaintiff paid the $200, and the defendant executed a receipt as follows:—

"May 9th, 1911. Received $200 two hundred dollars of lawful money on a contract of six hundred $600.

"A. Wilson.

"Contra(ct)

"Pay 200.00, 400.00 ten days on lot 4, block 4, west side Main street, Radville, bal(ance) to be arrange.

"A. Wilson."

On the 11th May the defendant gave the plaintiff the key of the premises; and, in pursuance of the purchase, and with the defendant's knowledge and consent, the plaintiff went into possession and immediately set to work to put the building situate on the front of the lot in shape for his business as a merchant-tailor. The defendant was fully aware of the purpose for which the property was purchased, and was fully aware of the plaintiff's intention to fit the premises up for that purpose. On the 13th May, the defendant suggested to the plaintiff that his stable situate on the back of this lot, and which was not included in the contract for the purchase of the lot, would do as a workshop. The plaintiff acted on this suggestion, and purchased this stable for $75, paying for the same on the 15th May. The plaintiff immediately incurred expense in moving the stable to the front of the lot and in making alterations in it, fitting it up as a workshop for his business. The defendant was an eye-witness of all these alterations and improvements, frequently visiting the premises as the work was progressing. On the 20th May, ten days after the contract for the purchase of the lot was entered into, the defendant asked the plaintiff what he was going to do about the balance of the payment, and the plain-

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tiff replied that he had not yet heard from McCaig about the mortgage, and that he would not give the notes until he did hear from him, and the defendant then said he would wait a few days longer. On the 23rd May, the defendant again asked for the notes, and the plaintiff then stated that he would like to see the title papers to the property—he had not as yet seen them—and the defendant replied that he would let him see them in a few days; that Mr. Moon had them at that time. He also intimated at that time that, if the plaintiff did not give the notes soon, he would take the place back, to which the plaintiff replied that in such event he would want his money back. On the 25th May, the defendant again saw the plaintiff and said he would take the place back. The plaintiff replied that he could have the place back if he gave him his money, but this was not agreed to. On the following morning, the defendant asked for the key of the premises, but the plaintiff refused, again saying he would give up the key if he got his money back. The defendant refused to return the money, and on the same day, without the consent of the plaintiff, he went into possession of the premises and continued to remain in possession, and subsequently resold the property. The plaintiff, in addition to paying $75 for the stable, to which I have referred, paid out $59.45 as wages for work done in fitting up the buildings on the lot for his business.

The plaintiff brings this action to recover the $200 paid, with interest, and the items of $75 and $59.45 paid respectively for the stable and for labour.

I have no hesitation in finding that the cash payment in this case of $200 was a payment on the contract, and not a mere deposit. The receipt given at the time characterises it as a payment "on a contract." Again, the amount is large in comparison with the total price to be paid, and to the plaintiff the loss of $200 would be a very serious matter. Is it likely that for the mere privilege of holding this property for ten days the plaintiff would pay $200? And again, the fact that the plaintiff went into possession and made extensive and costly improvements, and all this with the knowledge and approval of the defendant, would indicate that the money paid was as a cash payment on a contract of purchase. Again, there was no abandonment or repudiation of the contract on the part of the plaintiff. He delayed in giving settlement for the balance of the purchase-

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price, but this delay could not be considered in any sense as an abandonment or a repudiation. On the other hand, the defendant, by entering into possession and reselling the property, has determined the contract; and there is, in consequence, no obligation on the part of the plaintiff to come forward with the balance of the purchase price. Under these circumstances, the plaintiff is unquestionably entitled to a return of the $200: March Brothers & Wells v. Banton, 45 S. C. R. 338, ante 322.

Is the plaintiff also entitled to a return of the $75 and $59.45? In deciding that question, we must consider whether the defendant was, under the circumstances, justified in determining the contract. Time in this case was not of the essence of the contract. It was not made so by express terms, and it does not appear from the nature of the contract and the surrounding circumstances that such was the intention of the parties. See Parkin v. Thorold, 22 L. J. Ch. 174; Halsbury's Laws of England, vol. 7, p. 413. But, though time may not be of the essence of the contract, yet either party may, by a proper notice, bind the other to complete within a reasonable time to be specified in such notice: Parkin v. Thorold, supra; Forfar v. Sage, 5 Terr. L. R. 255; Wallace v. Hesslein, 29 S. C. R. 174; Halsbury, loc. cit. In this case I am of opinion that there was no such reasonable notice as would make time of the essence of the contract. The defendant did not at any time give notice that the notes must be given by the defendant within a definite and specified time. The notice was of a very indefinite character, and the matter was left in a very indefinite shape. In any event, the notice given did not, under the circumstances, provide a reasonable time within which the plaintiff was to perform. The defendant knew perfectly well that the object of fixing the ten days as the time for completion was because the plaintiff expected by that time to have heard from McCaig with reference to the mortgage. The plaintiff had not as yet heard from McCaig, and he was naturally desirous of knowing where he was at before going further ahead. In the event of not hearing from McCaig, he must make other arrangements. I am of opinion that, under the circumstances, the defendant was very harsh, and was not justified in taking the action which he did. The delay of the plaintiff could not be regarded as an undue and unjustifiable delay. The con-

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tract was, therefore, unjustifiably determined by the defendant, and as a result he is liable in damages. The ordinary rule of common law as to damages would apply in such a case: the plaintiff may recover for any special damage he has received: Mayne, 7th ed., p. 215. Where, as here, the improvements made were contemplated by the parties at the time of the contract, and are the fair consequence of the contract, there cannot be, in my judgment, any question of the plaintiff being entitled to recover: Bunny v. Hopkinson, 27 Beav. 567; Rolph v. Crouch, L. R. 3 Ex. 44; Mayne on Damages, 7th ed., p. 229.

In am of opinion, therefore, that the plaintiff is entitled to recover the $200 and interest, also the $75 and $59.45 as aforesaid. There will be judgment in the plaintiff's favour for these amounts, making $334.45, and interest on $200 from the 9th May, 1911, at five per cent., and costs.

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## SASKATCHEWAN.

APRIL 4TH, 1912.

### SUPREME COURT EN BANC.

## TOBIN v. CANADIAN PACIFIC R. W. CO.

*Negligence — Master and Servant — Injury to Servant — Negligent Act of Fellow-servant—Evidence — Inference —Question for Jury — Judge's Charge — Damages— Quantum.*

The plaintiff, a conductor on one of the defendants' construction trains, was injured by one of the wings of a machine for spreading gravel coming down on him with great force. He alleged that his injuries resulted from the improper and negligent act of W., another servant of the defendants, in setting the machine in motion, and claimed damages for his injuries. The evidence shewed that W. was the engineer in charge of the machine, and that the plaintiff, in the execution of his duty, was properly standing alongside of it. The machine was operated by air pressure. It was customary for the man in charge, before commencing to use it, to look at the air-gauge, which was on the top of the cylinder or air-tank, to ascertain if there was the proper pressure. W. leant over the tank to see the gauge; and he stated that his knee touched the lever or handle which opened the valve by which the air pressure was applied to the north wing. As a result of the application of the pressure, the wing descended rapidly and struck the plaintiff, injuring him severely. In answer to questions, the jury found: (1) that there was actionable negligence on the part of the defendants or their servants which contributed to

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the injury to the plaintiff; (2) that the negligence consisted of the fact that W. endeavoured to inspect the gauge without a light at a time when a light was necessary, and in so doing touched the valve that caused the accident; (3) that the plaintiff's damages were $12,097.50; (4) that the evidence went to shew that the valve was moved by contact with W.'s knee; and it must have been done while he was endeavouring to climb up on the tank in his endeavour to get near enough to the gauge to ascertain what pressure registered thereon:—

*Held*, that the trial Judge rightly refused a motion for a non-suit: it is for the Judge to say whether any facts have been established in evidence from which negligence *may* be inferred, and for the jury to say whether or not from those facts negligence *ought to* be inferred.

*Metropolitan R. W. Co.* v. *Jackson*, 3 App. Cas. 197, followed.

From the facts proven in this case it was a reasonable inference that W. was either climbing up the side of the tank when he opened the valve or that he sprang up and in so doing struck the valve with his knee; and so negligence might be inferred, for such conduct could not be said to comply with the standard of care required from these in charge of such machines.

*Held*, also, that the suggestion of the trial Judge, in his charge to the jury and in the questions submitted to them, that W. might have touched the valve with his knee, was warranted by the evidence.

*Held*, also, that the damages awarded were not so excessive as to warrant the interference of the Court.

Discussion of the rules and principles upon which the Court acts in dealing upon an appeal with the quantum of damages assessed at the trial; and review of the authorities.

Appeal by the defendants from the judgment of WETMORE, C.J., in favour of the plaintiff, upon the findings of a jury, for the recovery of $12,097.50, in an action for damages for personal injuries sustained by the plaintiff by reason of the negligence of the defendants, as alleged.

The appeal was heard by NEWLANDS, JOHNSTONE, LAMONT, and BROWN, JJ.

W. B. Willoughby and W. B. Powell, for the defendants.

H. Y. McDonald, for the plaintiff.

LAMONT, J.:—In August, 1910, the plaintiff, who was a conductor on one of the defendants' construction trains, was injured by one of the wings of a machine for spreading gravel coming down on him with great force. In his statement of claim he alleged that his injuries resulted from the improper and negligent act of one Neil Woodhouse, another servant of the defendant company, in setting the machine in motion. The evidence shewed that Woodhouse was the engineer in charge of the spreading machine, and that the plaintiff, in the execution of his duty, was properly standing alongside of it. The machine had large iron wings



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on each side, weighing between two and three tons each. When in operation these wings were let down, and were used to spread the gravel or ballast, which was brought on cars. It was operated by air pressure. The accident took place about 8.30 o'clock p.m., and at that time of night it was quite dusk. Orders had been given to spread some more ballast that night. It was customary for the man in charge of the machine, before commencing to use it, to look at the air-gauge, which was situated on the top of the cylinder or air-tank, to ascertain if there was the proper pressure for operating purposes. Woodhouse, who was called as a witness for the plaintiff, stated that on the night in question he looked at the gauge, but it was too dark for him to see the amount of pressure registered on it, without leaning over the tank. He states that he could have seen it, without leaning over, if he had used a lantern. A lantern had been provided for his use, but on this occasion he did not use it, although on some other occasions he had done so. He also stated that, when he leaned over to see the gauge, his knee touched the lever or handle which opens the valve by which the air pressure was applied to the wing on the north side of the machine. As a result of the application of the pressure, the wing descended rapidly, struck the plaintiff and knocked him down, breaking his left leg between the knee and the ankle, and otherwise injuring him. The evidence shewed that the air-tank was circular in shape and was situated in a horizontal position on the platform of a car, and that the gauge was in the centre of the tank on the top, about level with the eyes of a man standing on the car platform. The plaintiff in his evidence testified that the levers or handles of the valves by which the machine was operated were from two and a half to three feet above the platform. It was also shewn that the valve which put on the pressure which caused the injury was slack. This evidence was all submitted on behalf of the plaintiff. At the close of the plaintiff's case, counsel for the defendants moved for a nonsuit, on the ground that there was no evidence of negligence to go to the jury. The learned Chief Justice, who was presiding, refused the motion. Evidence was then put in for the defence. At the conclusion of the case, the learned Chief Justice submitted to the jury the following questions, to which the jury brought in the following answers:—

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1. Was there any actionable negligence on the part of the defendants or their servants which contributed to the injury to the plaintiff? A. Yes.

2. If so, what did such negligence consist of? A. We find the negligence consisted of the fact that Woodhouse endeavoured to inspect the gauge without a light at a time when a light was necessary, and in so doing touched the valve that caused the accident.

3. At what amount do you assess the damages? A. $12,000, plus $97.50 unpaid expenses.

4. If you find the defendants guilty of actionable negligence by Woodhouse touching the valve, did he touch it merely in leaning over to inspect the gauge, or did he touch it in an endeavour to climb on to the tank, or did he, seeing that he was near these valves, conduct himself negligently or carelessly in a general way and so touch it? A. We are of opinion that the evidence goes to shew that the valve was moved by contact with Woodhouse's knee. It must have been done while he was endeavouring to climb up on the tank in his endeavour to get near enough to the gauge to ascertain what pressure registered thereon.

On these answers the learned Chief Justice entered judgment for the plaintiff for $12,097.50. From that judgment the defendants now appeal to this Court. In their notice of appeal many grounds of appeal were set up, but on argument before us only three were urged:—

(1) That the learned Chief Justice should have nonsuited the plaintiff at the close of the plaintiff's case.

(2) That in his charge to the jury and in the questions submitted to them, the learned Chief Justice threw out the suggestion that Woodhouse might have touched the valve with his knee in attempting to climb up the tank to get a nearer view of the gauge, when no such suggestion appeared in the evidence.

(3) That the damages were excessive.

As to the first of the above contentions, I do not see how the learned Chief Justice could properly have directed a nonsuit. A plaintiff cannot be nonsuited if there is any evidence from which a jury may properly infer negligence on the part of the defendants of the character alleged in the statement of claim. It has long been an established rule that it is for the Judge to say whether any facts have been established in evidence from which negligence *may* be in-

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ferred. If so, it is for the jury to say whether or not from these facts negligence *ought to* be inferred: Metropolitan R. W. Co. v. Jackson, 3 App. Cas. 197.

Here the evidence established that the plaintiff's injuries resulted from the action of the defendants' servant Woodhouse, who was in charge of the machine, in striking the handle of the valve with his knee while he was endeavouring to see the amount of pressure registered on the face of the gauge. Whether in so striking it he was acting as a reasonable, cautious, and prudent man would have acted, under the circumstances, is the question. There was before the Court the fact that he could have seen the gauge without touching the tank at all if he had used a lantern; also the fact that a lantern had been provided for his use, and that on other occasions he had used it. Then there was the further evidence of the plaintiff that the handle or lever opening the valve in question was from two and a half to three feet above the platform on which Woodhouse says he was standing; and there was also a fact, not then expressly stated in evidence, but of which the Court had ocular evidence, namely, that Woodhouse's knee, when he was standing on the platform, was only eighteen inches above the platform, and would not, therefore, reach the handle of the valve. From these facts the question would naturally present itself, how could a knee which reached only eighteen inches above the platform strike a lever situated two and a half or three feet above the same platform? The answer which, it seems to me, would readily suggest itself is, either that he was climbing up to get closer to the gauge, or else he sprang up, hoping by that means to get his eyes near enough to the gauge to see the amount of pressure registered thereon. In the evidence given on behalf of the defendants, one of the witnesses was asked how Woodhouse's knee could touch the valve, and his answer was, "He must have been trying to climb up." If from the facts proven a reasonable inference may be drawn that Woodhouse was either climbing up the side of the tank when he opened the valve or that he sprang up and in so doing struck the valve with his knee, there is evidence from which negligence may be inferred, for such conduct cannot prima facie he said to comply with the standard of care required from those in charge of such machines. I am, therefore,

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of opinion that the learned trial Judge was right in refusing the application for nonsuit.

As to the objection raised to the charge, I am clearly of opinion that it is totally without merit. When the case was given to the jury, there were not only sufficient facts before the jury to enable them to draw the inference that Woodhouse was climbing up the tank when he touched the valve with his knee, but there was also the express statement of one of the witnesses for the defence that he must have been doing so.

The last ground of appeal was, that the damaged allowed were excessive. The jury awarded the plaintiff $12,000 damages and $97.50 unpaid expenses. The plaintiff was very severely injured in the left leg between the knee and ankle. For a space of five inches where the bar of the wing caught his leg the bones were broken in more than one place. There was what is called a multiple fracture. The bone was so crushed that several pieces were removed. At the date of the trial, some fifteen months after the accident, ischamic paralysis had set in. The injury to his left leg is of a permanent nature and will cripple him for life. In addition, five teeth were knocked out, and the plaintiff suffered several flesh wounds on the head, body, and right leg. From these, however, at the time of the trial, he had pretty well recovered, with, of course, the exception of his teeth. He also suffered from nervous shock occasioned by the accident.

The rule as to setting aside a verdict on the ground of excessive damages was laid down by Lord Esher, M.R., in Praed v. Graham, 24 Q. B. D. 53, as followe: "I think that the rule of conduct is as nearly as possible the same as where the Court is asked to set aside a verdict on the ground that it is against the weight of evidence. If the Court, having fully considered the whole of the circumstances of the case, come to the conclusion only, 'We think that the damages are larger than we ourselves should have given, but not so large as that twelve sensible men could not reasonably have given them,' then they ought not to interfere with the verdict."

This rule, however, as was pointed out in Johnston v. Great Western R. W. Co., [1904] 2 K. B. 250, must be construed in the light of the other decisions of the Court.

In his Laws of England, vol. 10, p. 350, Lord Halsbury

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lays down the rule relating to excessive damages, as gleaned from all the cases, as follows: "Where the damages awarded by a jury are excessive, a new trial will be granted if the Court of Appeal, without imputing perversity to the jury, comes to the conclusion, from the amount of damages and the other circumstances, that the jury must have taken into consideration matters which they ought not to have considered or have applied a wrong measure of damages. The mistake of the jury caused either by misdirection as to the measure of damages, or by failing to consider right matters or considering wrong matters of damage, or by applying a wrong measure of damage, although rightly directed as to the rule applicable, may be rectified by the Court of Appeal under this power."

It was not suggested on the argument before us that there was any misdirection by the learned Chief Justice in his charge to the jury as to the measure of damages; nor, apart from the fact itself that the amount awarded is very large, can I find any evidence that the jury allowed damages in respect of matters which should not have been considered or that they applied a wrong measure of damage. The question, then, is: from the fact alone that they have awarded $12,000 are we forced to conclude that they must have erred in assessing the damages? Is the amount so unreasonably large that twelve sensible men, properly instructed, and assessing damages on proper principles, could not have awarded it? In fixing the amount, the jury were entitled to award damages not only for the actual pecuniary loss occasioned by the injury, but also for the pain and suffering of the plaintiff and the diminution of his capacity for the enjoyment of life, as well as in respect of his probable inability to earn an income equal to that which he had earned previous to the accident, and the probability that but for the injury he might have earned an increasing income: Halsbury's Laws of England, vol. 10, p. 323.

The plaintiff had been in the defendants' employ constantly since 1896 as brakesman and conductor. This has been practically his life's work. At the time of the accident, he was the conductor of a construction train. As such, his wages amounted to as much as $250 per month. Construction work, however, lasted only through the summer months. In the winter months he was employed as a conductor on freight trains, and earned from $125 to $170 per month.

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His injuries have permanently disabled him, and he can no longer follow the occupation at which he has been employed for so many years. To earn an income he will have to employ himself at some business suited to his crippled capacity. What he can earn is problematical. He tried selling insurance, but was not able to make more than travelling expenses. The only money he has been able to earn since the accident, in addition to what he received from the insurance company, was some $38 for enumerating. Under these circumstances, it is impossible to say with any degree of accuracy what would be the difference between the amount he would have earned had there been no accident and the amount he will be able to earn in his crippled condition. Yet this is an important factor to be considered by the jury in fixing the damages awarded, and by us in determining whether or not the amount awarded is excessive.

In Johnston v. Great Western R. W. Co., supra, Vaughan Williams, L. J., at p. 257, said: "Now, in my opinion, the only way in which the figure of the damages and the circumstances of the present case could prove that the jury in measuring the damages took into consideration topics which they ought not to have taken into consideration, or applied a measure of damages which they ought not to have applied, would be, if we could draw the inference that the amount of the verdict proved that the jury had disregarded the fact to which their attention was drawn by Grantham, J., that the accidents of life and other elements ought to be taken into consideration so as to prevent a jury from giving a plaintiff such a sum as would be simply an investment, enabling him to do nothing to earn his livelihood. Now one could only come to such a conclusion if it could properly be said that no jury, having regard to the evidence, could have put the difference between the prospective earnings of the plaintiff if he had been uninjured and those earnings after his injury at a higher figure than, say, £10 a year, and then if you found that the amount of the verdict, after deducting all special damage and all damages given for personal pain and suffering, was a sum which equalled or exceeded the sum which would purchase a life annuity for a person of the plaintiff's age equal to the difference to which I have referred. In such a case I think a new trial might be ordered without reference to any perversity of mind of the jury in regard to the quantum. In any case

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in which you are able to draw the inference that the jury either included a topic which ought not to have been included, or measured the damages by a measure which ought not to have been applied, I think there ought to be a new trial."

There was no evidence from which the Court could ascertain what was the plaintiff's age at the time of the trial or the value of an annuity a person of the plaintiff's age could purchase with the amount awarded. It is, however, clear that the amount awarded, even without making any deduction therefrom for the pain and suffering of the plaintiff, if put out at interest, would not yield anything like the income which the plaintiff could reasonably expect he would have made but for the accident. Even if it could be invested to yield 8 per cent. per annum, which it was argued is the prevailing rate of interest in this province, it would not earn much more than a half of what the plaintiff had been earning. But I do not think that it could be invested to yield 8 per cent. for the rest of the plaintiff's life. With the development of the province, the rate of interest to be obtained here will approximate to that of the older provinces, where five or six per cent. is the prevailing rate. On the other hand, it must not be forgotten that, in assessing damages for personal injuries caused by negligence, the jury must not attempt to award the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case and give what they consider under all the circumstances a fair compensation: Rowley v. London and North Western R. W. Co., 8 Ex. 221; Sheahen v. Toronto R. W. Co., 25 O. L. R. 310. Looking at all the circumstances, the permanently crippled condition of the plaintiff, the income he was earning and likely to earn but for his injuries, the problematical amount he may earn in future, and the pain and suffering he has endured, I cannot say that the jury have awarded an amount which, after deducting all special damages, and all damages for personal pain and suffering, would purchase a life annuity for the plaintiff equal to or approaching the difference between his prospective earnings, had be not been injured, and the amount he will probably earn in his injured condition. Nor can I say that they have taken into consideration matters which they ought not to have considered, or that the amount awarded is such that twelve sensible men could not have

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awarded it. It is more, considerably more, than I would have awarded had I been called upon to assess the damages in the first instance, but that of itself is not sufficient to justify interference by an appellate Court.

In Johnston v. Great Western R. W. Co., above referred to, Vaughan Williams, L.J., at p. 254, said: "If the only matter brought before the Court is an over-estimate of the damages, I take it that the rule laid down by Lord Esher, M.R., in Praed v. Graham is incontrovertible."

In the recent case of Bateman v. County of Middlesex, 25 O. L. R. 137, the point came before an Ontario Divisional Court. In that case, the plaintiff, a physician, fifty-five years old, was injured while driving along a country road early in the morning, by reason of a barricade being left without a light. The accident caused a falling of the right kidney, an injury to the right pleura, an infected gall bladder, and a milder form of neurasthenia. Riddell, J., before whom the case was tried, awarded $12,500 damages. An appeal was taken to the Divisional Court, on the ground that the damages were excessive. Boyd, C., in giving the judgment of the Court, said: "The amount awarded is larger than we should have awarded, had the case come before us in the first instance. The legislature has seen fit to provide that actions of this kind shall be tried by a Judge without a jury; and we must attribute to this assessment of damages as much weight as would be given to the finding of a jury. It is not suggested that the learned Judge acted upon any wrong principle; and the fact that in his discretion he had given more, even much more, than we should have given, is not enough to warrant the interference of an appellate Court."

I am, therefore, of opinion that sufficient has not been shewn to justify us in interfering with the amount awarded by the jury. In addition to the authorities above referred to, the following are instructive: Taylor v. British Columbia Electric R. W. Co., 19 W. L. R. 851; Carty v. British Columbia Electric R. W. Co., 19 W. L. R. 905; Bradenburg v. Ottawa Electric R. W. Co., 19 O. L. R. 34; Hansen v. Canadian Pacific R. W. Co., 7 Can. Ry. Cas. 429; Clark's Accident Law, 2nd ed., p. 416 et seq.

The appeal should be dismissed with costs.

NEWLANDS, J.:—The plaintiff, while in the employ of the defendant company, was injured by one of the wings

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of a McCann machine, a machine used in grading, falling upon him; and he brought this action for damages, alleging: (1) the negligence of the defendants, their workmen and servants; and (2) that the machine was defective in that the staple in the upright post thereof and the chain between said staple and the wing of the machine were not sufficiently secure or strong to prevent said wing from coming down when pressure was improperly, carelessly, or negligently applied. There was no evidence to sustain the second ground; and the sole question, apart from the amount of damages given by the jury, is whether there was any evidence of negligence on the part of the defendant company to go to the jury.

Mr. Willoughby argued that the learned trial Judge, having expressed the opinion at the close of the plaintiff's case that there was no evidence of negligence, should have nonsuited the plaintiff, instead of letting the case go to the jury.

Upon this question the following rule is laid down by Cairns, L.C., in Metropolitan R. W. Co. v. Jackson, 3 App. Cas. 193, as the principle which was decided in Bridges v. North London R. W. Co., L. R. 7 H. L. 213, namely, "that from any given state of facts the Judge must say whether negligence can legitimately be inferred, and the jury whether it ought to be inferred."

It was shewn by the plaintiff's evidence that one Woodhouse, an employee of the defendant company, went to the machine which caused the accident for the purpose of ascertaining by the air-gauge whether there was sufficient air in the reservoir to operate the machine; that it was dusk at the time, and not having a light with him, he had to lean over, and in doing so his knee caught one of the valves and opened it, and caused the wing to drop, which injured the plaintiff.

Now, I have no doubt that negligence can be legitimately inferred from the above facts; and I am, therefore, of the opinion that the learned trial Judge was right in not nonsuiting the plaintiff. By the defendants' evidence it was shewn that the valve in question was some two or three feet above the floor of the car, and that Woodhouse could not have touched it with his knee unless he had climbed up on the machine when he went to look at the gauge. This is corroborated by the pictures of the machine put in as exhibits. . . .

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[The learned Judge then set out the questions left to the jury and their answers.]

As to the questions put to the jury, Mr. Willoughby argued that No. (4) was an improper one, in that it left the jury to draw an inference for which there was no evidence, i.e., "did he touch it in an endeavour to climb upon the tank?" The same objection was taken by him to the learned trial Judge before the jury retired; and his Lordship's reply, that "it was an argument based upon the evidence, because when the witness to whom you refer—McCallum—was on the stand, Mr. MacDonald drew attention to the height of his knee, and he put this question to him: 'Seeing the height of the valve and the height of his knee, he must have been attempting to climb the tank?' and the witness replied that he must have been," is one with which I entirely agree.

I am, therefore, of the opinion that the learned trlai Judge was right in leaving the question of negligence to the jury; and that the evidence justified the jury in bringing in the verdict which they did; and that that verdict should not be disturbed.

As to the amount of the damages, I can see no adequate reason for disturbing the verdict.

JOHNSTONE and BROWN, JJ., concurred.

*Appeal dismissed.*

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## SASKATCHEWAN.

APRIL 4TH, 1912.

SUPREME COURT EN BANC.

## MEIVRE v. STEINE.

*Vendor and Purchaser—Contract for Sale of Land—Establishment of Contract—Correspondence — Offer — Acceptance—Counter-offer.*

**The plaintiff sought specific performance of an alleged contract for the sale by the defendant to him of a quarter section of land:—**

***Held,* that the letters relied on by the plaintiff as an offer and acceptance did not make a contract, the letter relied on as the acceptance being in fact a counter-offer.**

Appeal by the defendant from the judgment of BROWN, J., in favour of the plaintiff, the administratrix of the estate

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of Joseph Percher, deceased, in a purchaser's action for specific performance of an alleged contract for the sale of land.

The appeal was heard by WETMORE, C.J., NEWLANDS, JOHNSTONE, and LAMONT, JJ.

P. E. Mackenzie, for the defendant.

H. Y. MacDonald and J. D. Brown, for the plaintiff.

The judgment of the Court was delivered by

NEWLANDS, J.:—This is an action for specific performance of an alleged agreement of sale of the south-east quarter of section 7, township 43, range 24, west of the 3rd meridian. The defence is a denial of the alleged agreement. The trial Judge found that the letters of the 23rd and 29th June, between the defendant and A. B. Dirks, a real estate agent at Rosthern, constituted a contract. These letters are as follow:—

"Montreal, June 23rd, 1909.

"A. B. Dirks, Esq., Rosthern, Sask.

"Dear Sir: I have your favour enclosing cheque for $100, which I herewith return you. You have evidently read my telegram wrong. You wired me June 12th: "Sold your land at Rosthern $15 per acre, $400 cash, six equal annual payments, 8 per cent., privilege to pay all second year, subject to 50 cts. per acre cash commission, wire acceptance.' When your wire reached Montreal, the writer was out of town, but answered on the 15th reading: 'Will accept $2,400, $400 cash, purchaser paying costs commission.' The last price that I gave you on the land was given you in my letter from Vancouver, which was $15 net, and my telegram is practically a confirmation of that price; this is the lowest figure that I will sell the land at just now. If this is satisfactory to your client, I would want to receive an answer of his acceptance by return mail. This price is subject to change without notice.

"Yours very truly,

"M. B. Steine."

"Rosthern, Sask., June 29th, 1909.

"Mr. M. B. Steine, 86 Grey Nun St., Montreal, Canada.

Dear Sir: Re S.E. 7-43-2-West 3rd. Your letter of the 23rd reached me yesterday, and I note what you say. I am

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quite sure that I interpreted your telegram right, that you would allow me 50 cents. an acre commission ont of $15 per acre if I got that much more cash, but to get the matter to a close, we are willing to close out the deal at $15 per acre net to you with a cash payment of $550—balance in 6 equal annual payments. I got my client to pay $15.50 per acre, which means 50 cents an acre commission for me. Now there is a second man in the deal that takes half the commission, which will only leave a small amount for me. I think it is only fair of you to make the commission $100 in this case, as I am getting you more cash than you asked, and have had so much trouble and correspondence in this matter for over two years now, look after the hay part for you and never got anything for it, and got you such a high rate of interest on this deal, I think it is only fair to ask you to make the commission $100, as I have to give half of it to another man. I am preparing contracts, and as soon as they are signed by the purchaser I will send them to you for signature, so that you can sign and return one copy together with draft attached. I find that there are one year's taxes in arrears, which I will pay and deduct from the cash payment, together with my commission. Enclosed please find my cheque for $100 as earnest money that the deal is closed as stated in this letter. I will ascertain the amount that is still coming to you less commission and taxes, and will send contracts to you for signature together with a statement and you can make draft accordingly. I trust that this will be satisfactory.

"I am yours truly,
"A. B. Dirks."

To come to the conclusion that these letters constituted a contract, the learned trial Judge must have found that Dirks was the agent of the purchaser. As a matter of fact he was to a certain extent acting for both parties. He was agent of the defendant for the purpose of procuring a purchaser, and the agent of the plaintiff to complete the contract.

The price put upon this land in the letter of the 23rd June is $2,400. The price which the vendor is to receive by the letter of the 29th June is 15 per acre. Now, as there are only 153.42 acres in this quarter section, a fact known to both Dirks and Steine, this price amounts to only $2,301.30; and the letter of the 29th June is not, therefore,

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an acceptance of the offer to sell for $2,400. The learned trial Judge evidently construed the letter of the 23rd June—where the defendant said, "The last price that I gave you on the land was given you in my letter from Vancouver, which was $15 net, and my telegram is practically a confirmation of that price; this is the lowest figure I will sell the land at just now"—to mean that the offer of $2,400 was the same as an offer of $15 per acre. But the defendant does not say that. He does not say that the offers are actually the same, but practically the same, meaning almost or very nearly the same price. Now, the letter of the 23rd June, mentioning one price, and that of the 29th June, another, the latter letter cannot be considered an acceptance of the first, but rather a new proposal, which must be accepted by the defendant before a contract can be arrived at. From this time on the parties got no nearer together. When a price was finally agreed on, viz., $2,375, the defendant's terms as to the payment down were not complied with, nor could they come to an agreement as to the subsequent payments.

Taking all the correspondence together, I am of opinion that the parties never at any time got together so that there was a binding contract between them.

The defendant's counterclaim for mesne profits was abandoned on the argument.

*Appeal allowed with costs.*

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## SASKATCHEWAN.

APRIL 4TH, 1912.

SUPREME COURT EN BANC.

## COTÉ v. OLSON.

*Vendor and Purchaser—Contract for Sale of Land—Purchase-money Payable by Instalments — Assignment of Contract—Liability of Assignee to Pay Instalments — Covenant — Possession — Indemnity — Right of Action —Notice.*

A covenant to pay the purchase-money, in an agreement for the sale of land, does not run with the land.

An assignee of the interest of the purchaser under an agreement for the sale of land cannot be held liable in equity for the purchase-money because he took the assignment with notice that the instal-

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ments of purchase-money provided for in the original agreement had not been paid.

Review of authorities.

Judgment of WETMORE, C.J., 19 W. L. R. 156, upon the facts there stated, reversed.

Appeal by the defendant from the judgment of WETMORE, C.J., 19 W. L. R. 156, in favour of the plaintiff, in an action to recover an instalment of purchase-money under an agreement for the sale of land.

The appeal was heard by NEWLANDS, JOHNSTONE, LAMONT, and BROWN, JJ.

E. L. Elwood, for the defendant.

D. Mundell, for the plaintiff.

NEWLANDS, J.:—The facts of this case are briefly as follows. On the 17th April, 1909, one William J. Page, by an agreement in writing, agreed to sell to one Carl Radke lot 2 in block 1 and lots 12 and 13 in block 2, Maryfield, in consideration of which Radke agreed to pay to Page the sum of $4,000, in four payments of $1,000 each, on the first day of November, 1910, 1911, 1912, and 1913, with interest at 7 per cent. on so much of the principal as might be from time to time due.

On the 7th March, 1910, Radke, by an instrument in writing, sold, assigned, and transferred to the plaintiff, for the consideration of $4,000, all his interest in the said agreement of sale; and on the 11th April, 1910, the plaintiff, by an instrument in writing, sold, assigned, and transferred to the defendant, for the consideration of $4,000, all his interest in the said first-mentioned agreement of sale; and in neither case was the $4,000 paid.

Afterwards, on the 19th May, 1910, Carl Radke, by an instrument in writing, assigned all his interest in the agreement of sale from himself to the plaintiff to the said William J. Page, and Page, by an instrument in writing dated the 1st November, 1910, assigned all his interest in the agreement of sale from himself to Radke and from Radke to Coté to the plaintiff.

The first payment set out in the agreement of sale from Page to Radke fell due, but was not paid by the defendant to Page, and was afterwards paid by the plaintiff to Page; and the plaintiff brings this action to recover the same from the defendant.

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The action was tried before the learned Chief Justice, who inclined to the opinion that the covenant to pay the purchase-money contained in the agreement of sale from Page to Radke was a covenant running with the land, but held that it was not material whether it was or not, because the defendant purchased and went into possession with the full knowledge that the instalments of purchase-money had to be paid, and that in equity he was bound to pay all that fell due during his possession, and he gave judgment accordingly against the defendant for the amount due and paid by the plaintiff to Page. From this judgment the defendant appeals.

Now there is no question but that, if the defendant wishes to retain this land, he must pay the amount due, and that he must either give up the land or pay the money; but I am of the opinion that he is not personally liable to either the plaintiff or Page for the amounts payable under the said first-mentioned agreement of sale. He is not so liable to the plaintiff under the instrument of the 11th April, 1910, from the plaintiff to himself, because there is no promise on his part to pay anything to the plaintiff; and, the amount mentioned in that instrument as the consideration being the amount due Page, it was evidently the intention of the parties that this amount should be paid to Page and not to the plaintiff. Nor could Radke assign to the plaintiff or the plaintiff to the defendant the burden of the agreements they had entered into with Page and Radke respectively, the burden of a contract not being assignable.

Williams on Vendors and Purchasers, p. 501, says: "Of course, neither party to the contract can assign over the burden thereof. It follows that, when one party to the contract has assigned his interest therein, he remains liable to perform his part of the contract; and the other party cannot sue the assignee, either for the specific performance or for damages for breach of the contract, unless he has accepted the assignee as occuping the assignor's place in respect of the fulfilment of the contract:" Tolhurst v. Associated Portland Cement Manufacturers, [1902] 2 K. B. 668.

The instrument of the 17th March, 1910, from Radke to the plaintiff, being similar in form to that from the plaintiff to the defendant, Radke could not by assignment give Page any better claim against the plaintiff than he had himself, nor could Page by the assignment to the plaintiff give

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him any better claim that he himself had; and, therefore, the asignment from Page to the plaintiff only assigned to the plaintiff what Page himself had, and that is, his claim against Radke—Page, under the above authorities, having no claim against the subsequent assignees.

The covenant contained in the agreement of sale from Page to Radke is, in my opinion, a personal covenant, and not a covenant running with the land. It is a covenant similar to the covenant of a mortgagor to pay the mortgage-money to the mortgagee, and the conveyance of the equity of redemption did not make the assignee thereof liable personally to pay the mortgage-money to the mortgagee: Robins on Mortgages, p. 964. "Covenant to pay by the mortgagor does not run with the mortgaged property so as to give to the mortgagee any right of action on the covenant against the assignee of the equity of redemption:" Butler v. Butler, 5 Ves. 534; In re Errington, Ex p. Mason, [1894] 1 Q. B. 11; Thorne v. Cann, [1895] A. C. 11, at p. 18.

That the defendant took with knowledge that the payments due would have to be made does not make him personally liable, but it charges the land with the burden of these payments, and the defendant cannot get the land without first making the payments.

The plaintiff cannot, therefore, in my opinion, recover in this action from the defendant; and the appeal should be allowed with costs.

JOHNSTONE and BROWN, JJ., concurred.

LAMONT, J.:—This is an appeal from the judgment of the learned Chief Justice in favour of the plaintiff in an action to recover an instalment of purchase-money under an agreement for the sale of land. The registered owner of the land was, and still is, one W. J. Page. By an agreement in writing dated the 17th April, 1909, Page sold the land in question to one Radke for $4,000, payable $1,000 on the 1st day of November in each of the years 1910, 1911, 1912, and 1913. On the 17th March, 1910, by writing under seal, indorsed on the agreement from Page, Radke assigned to Alphonse Coté, the plaintiff herein, all his interest in "the within written instrument." Coté entered into possession of the premises, and on the 11th April, 1910, he in turn,



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by writing also indorsed on the original agreement, assigned all his interest in "the within written instrument" to the defendant (Olson) for an expressed consideration of $4,000. In neither of these assignments was there any covenant by the assignee to pay the said $4,000. On the 19th May, 1910, by an instrument in writing, Radke assigned to Page all his (Radke's) interest under the assignment to Coté. Then, on the 1st November, 1910, the day on which the first instalment of purchase-money fell due, under the agreement of the 17th April, 1909, a new agreement was entered into betwen Page and the plaintiff (Coté), in which, after reciting that no money had been paid to Page under the original agreement, it was agreed that Coté would pay $3,250 to Page, by instalments, and, upon the payments being made, Page would convey to him the said land. The agreement also contained a clause by which Page assigned to Coté all his claims against Radke under the agreement of the 17th April above-mentioned, except the right to collect interest on $4,000 therein mentioned from the 17th, April, 1909, to the 17th March, 1910, which Page reserved to himself. The defendant had paid $100 when he took the assignment from the plaintiff, but made no further payments. On these facts the plaintiff brought this action, and claimed judgment for the instalment of $1,000 and interest falling due on the 1st November, 1910, either by virtue of his assignment to the defendant or by virtue of the assignment to him of the contract made between Page and Radke. The learned Chief Justice, in giving judgment for the plaintiff, was rather of opinion that the covenant to pay the purchase-money contained in the original agreement was a covenant running with the land so as to bind the defendant, because it was made by Radke for himself "and his assigns;" but he held that, in any event, it was a covenant enforceable in equity against the defendant during his possession, because he had taken the assignment with notice that the instalments to Page had not been paid; and he cited as authorities the cases of Morland v. Cook, L. R. 6 Ex. 252, and Cooke v. Chilcott, 3 Ch. D. 694. With very great deference, I am of opinion that this is not one of the cases in which the covenant can be said to run with the land.

In Rogers v. Hosegood, [1900] 2 Ch. 388, Farwell, J., stated what I believe to be the law as follows: "Covenants which run with the land must have the following character-

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istics: (1) they must be made with a covenantee who has an interest in the land to which they refer; and (2) they must concern or touch the land."

That is, as was said by Bayley, J., in Congleton v. Pattison, 10 East 130: "In order to bind the assignee, the covenant must either affect the land itself during the term, such as those which regard the mode of occupation, or it may be such as per se, and not merely from a collateral circumstance, affects the value of the land at the end of the term."

Now, I am of opinion that a covenant to pay the purchase-money in an agreement for the sale of land cannot be said to affect the land either as regards its mode of occupation or its value. It places no restriction on the mode of occupation, nor does it increase or diminish the value of the land. It is, not, therefore, under the above authorities, one of the covenants which may be said to run with the land.

Neither does it seem to me that this is a case in which the defendant can be held liable in equity because he took an assignment of the plaintiff's interest with notice that the instalments set out in the original agreement had not been paid.

In Haywood v. Brunswick Building Society, 8 Q. B. D. 403, which, it will be noted, was the case of a grant and not that of a lease, Brett, M.R., stated the rule as to covenants which would be enforced in equity against an assignee taking with notice, in the following language: "Now the equitable doctrine was brought to a focus in Tulk v. Moxhay, which is the leading case on this subject. It seems to me that that case decided that an assignee taking land subject to a certain class of covenants is bound by such covenants if he has notice of them, and that the class of covenants comprehended within the rule is, that covenants restricting the mode of using the land only will be enforced. It may be also, but it is not necessary to decide here, that all covenants also which impose such a burden on the land as can be enforced against the land would be enforced . . . But it is said that if we decide for the defendants we would have to overrule Cooke v. Chilcott. If that case was decided on the equitable doctrine of notice, I think we ought to overrule it."

In the present case, the covenant to pay does not, as I have already pointed out, place any restriction on the mode of using the land, nor does it impose a burden which may

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be enforced against the land itself. The vendor may have a lien on the land for the purchase-money, but he does not obtain that lien by virtue of the covenant of the purchaser to pay the purchase-price. The covenant is something entirely apart from the vendor's lien, and is not by itself a charge on the land. A covenant to pay the purchase-money, like a covenant by a mortgagor to pay the mortgage-money, is a personal covenant.

In reference to a mortgagor's covenants, I find in Fisher's Law of Mortgages, ed. of 1910, paragraph 809, the following: "The burden of such a covenant does not run with the equity of redemption, and therefore the mortgagee cannot sue the assignee of the equity either for the principal or interest." See also Aldous v. Hicks, 21 O. R. 95.

The plaintiff, therefore, cannot recover by virtue of his being the assignee of the original agreement between Page and Radke. Can he recover by virtue of the assignment to the defendant from himself? That assignment does not contain any promise on the part of the defendant to pay, nor was it executed by him. There was no express promise at all by the defendant that he would pay the purchase-money. But it was argued that, even if there was no express promise, the defendant was under an implied promise to indemnify the plaintiff in case he had to pay Page. Whatever may be the rule as to indemnity, it can have no application in this case, because the plaintiff himself was under no obligation to Page for the purchase-money until he entered into the agreement of the 1st November, 1910. By assigning his rights in the land, the plaintiff cannot impose any burden upon the defendant, in the absence of an express or implied consent on his part to assume those obligations. The effect of such a unilateral agreement is to confer certain rights upon the defendant. It gives him, first, an equitable interest in the land to the extent of the purchase- money he has paid; and, second, a right to receive title on payment of the purchase-money in full. If he does not pay the purchase-money, the plaintiff can close out his interest in the land. But the plaintiff has no right to sue the defendant for the purchase-money unless the defendant has either expressly or impliedly agreed to be responsible for the same. In this case, I hold, he has not done so. I am, therefore, of opinion that the appeal should be allowed with costs.

*Appeal allowed with costs.*

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## SASKATCHEWAN.

WETMORE, C.J. APRIL 4TH, 1912.

TRIAL.

# ONTARIO WIND ENGINE AND PUMP CO. v. ELDRED.

*Company — Manitoba Company Suing in Saskatchewan Court—Pleading — Objection Raised at Trial—Unregistered Foreign Company — Presumption — Inference—Contract, where Made—Action on Lien-notes — Sale of Machinery — Defence — Unfulfilled Condition — Oral Agreement—Proof of.*

In an action brought in the Supreme Court of Saskatchewan, to recover the amount alleged to be due on four lien-notes made by the defendant in favour of the plaintiffs, it was alleged by the first paragraph of the statement of claim that the plaintiffs were an incorporated company, carrying on business in the province of Manitoba, with an office at the city of Winnipeg, in the said province, and the defendant was a farmer residing in Saskatchewan. This was neither admitted nor denied in the statement of defence; the defendant did not plead that the plaintiff had no right to sue in Saskatchewan; and no question of law was raised in the pleadings with respect to the plaintiffs' right to sue; but, at the opening of the trial, the defendant's counsel raised the objection that in point of law the plaintiffs could not succeed, because it must be inferred from the first paragraph of the statement of claim that the plaintiffs were a foreign company, and—there being no allegation that they had registered under the Foreign Companies Act—they could not carry on business in Saskatchewan:—

*Held*, that it was open to the defendant, under Rule 219, to take such an objection at the trial, although not raised by his pleading; but the statements made in the first paragraph of the statement of claim were not sufficient statements of fact to raise the question of law—it was not stated that the corporation, being a foreign corporation, were carrying on business for gain in the transaction in respect of which the lien-notes came to be given.

*Held*, also, that, in the circumstances shewn in evidence, no offence was proved or to be implied on the part of the plaintiffs against the provisions of sec. 3 of the Foreign Companies Act, R. S. Sask. ch. 73.

It is not the common law that a corporation cannot carry on business without special authority.

*Bank of Montreal* v. *Bethune*, 4 O. S. 341, and subsequent cases in Upper Canada, are overruled by *Canadian Pacific R. W. Co.* v. *Western Union Telegraph Co.*, 17 S. C. R. 151.

It should not be assumed that the plaintiffs were acting illegally. The presumption rather was, in the absence of proof to the contrary, that they were seeking to recover a debt which they were legally authorised to recover.

Where a person living in Saskatchewan forwards on order to a Manitoba company at Winnipeg to send an article to him, and that order is accepted and the article shipped, that is not carrying on business for gain in Saskatchewan.



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**The defendant had not brought the plaintiff, so far as this transaction was concerned, within the purview of the Companies Act; and the objection was not well taken.**

***Held*, also, that it was not open to the defendant to set up, in answer to the claim upon the notes, that they were given by him upon a condition orally arranged which was not fulfilled by the plaintiffs; and, even if it were open, that the arrangement alleged to have been made by the plaintiffs upon the sale of a drilling outfit for which the notes were given, was not in fact made.**

Action for the amount alleged to be due on four lien-notes made by the defendant in favour of the plaintiffs.

F. F. MacDermid, for the plaintiffs.

H. Y. MacDonald and J. N. Crerar, for the defendant.

WETMORE, C.J.:—The first paragraph of the statement of claim alleges that "the plaintiff is an incorporated company, carrying on business in the province of Manitoba, with an office at the city of Winnipeg, in the said province, and the defendant is a farmer, residing near the post-office of Guernsey in the province of Saskatchewan," and it then goes on to set out the notes and the presentment of them in the usual manner. The first paragraph of the claim was neither admitted nor denied in the statement of defence, and no question of law was raised in the pleadings with respect to the right of the plaintiff company to sue, nor was any plea pleaded setting forth that they had no right or authority to sue in the Courts of this province. No attention whatever was given to the first paragraph of the claim. The only defence set up was, that the notes were given for a well-drilling outfit, and that at the time the defendant gave such notes he knew nothing about working such an outfit, and that he gave the notes upon the condition that the plaintiffs would furnish and procure for him an expert well-driller to work with, assist, and shew the defendant how to work such drilling outfit and complete the well during the drilling and until the completion of the first well drilled by the defendant with the outfit during the summer of 1909; and that, if the plaintiffs did not do as so set forth, the defendant would not be required or compelled to pay the notes or any part thereof and would be released and discharged from all obligations in respect thereof; and that the plaintiffs have not furnished nor procured for the defendant the expert well-driller or any well-driller as agreed; and the defendant claims, therefore, to be discharged from all liability in respect to the notes; and, in the alternative,

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it is set up in the defence that the defendant executed to the plaintiffs a chattel mortgage upon certain goods for the price of the drilling outfit, and that the plaintiffs, before the commencement of the action, made distress and seizure of the goods and chattels mentioned in the mortgage; and the defendant alleges that the consideration for the lien-notes was satisfied and discharged. The defendant also counterclaimed for breach of contract in not furnishing the expert assistance as hereinbefore set forth. Nothing turns upon the alternative defence. The plaintiffs sent a man out to seize under the chattel mortgage, but he did not seize anything.

At the opening of the case, the defendant's counsel raised the objection that in point of law the plaintiffs could not succeed because the first paragraph of the claim alleged that they were an incorporated company carrying on business in the province of Manitoba with an office at the city of Winnipeg. It was urged that from this I must infer that the plaintiffs were a foreign company; and, there being no allegation that they had registered under the Foreign Companies Act, they could not carry on business in this province. I declined to stop the case at that stage, and heard the evidence produced. I may say I was somewhat in doubt whether, under Rule 219 of the Rules of Court, it was open to the defendant to insist upon this question of law, it not having been raised by his pleading. However, on consideration, I am of opinion that he could do so. The text-books dealing with the corresponding Rule in the English Practice seem uniformly to agree that it can be done. I refer to the Annual Practice, 1911, note to Order XXV., Rule 3, and to Odgers on Pleading, 2nd ed., p. 114. I may also refer to the remarks of Lindley, J., in Stokes v. Grant, 40 L. T. R. at p. 37. It seems that the practice as set forth in these text-books was as so set forth before the English Judicature Act, and it may be considered as not changed by that Act. I am, however, of opinion that the point cannot be raised in this case, in view of the pleadings. It seems to me that it would require some allegation of fact before it could be raised. The mere facts set forth in the statement of claim do not raise it; and I find that wherever the question of the right of a foreign corporation to sue in a British Court has been raised, the fact has been stated that it is a foreign corporation. At any rate, I am of opinion

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that it must be distinctly set forth, in order to meet the law in this province on this subject (which I shall hereafter point out), that the corporation, being a foreign corporation, were carrying on business for gain in the transaction out of which the lien-notes came to be given. What I wish to convey, I think, can be more pointedly set out when I proceed to set forth what the facts of this case were as given in evidence, because the facts are not set forth with absolute correctness in the pleadings.

The facts as I find them are as follows. One McTighe, some time in March or April, 1909, purchased this drilling outfit from the plaintiffs. Now there is not a particle of evidence to shew where that purchase was made. The outfit was delivered to McTighe—there is no evidence where, but as a matter of fact it was delivered, and he operated it to some extent; and, about the latter part of July or the first part of August he had it at Guernsey, in Saskatchewan. He was not very successful in operating it, and the defendant agreed to take it off his hands, by an instrument dated the 28th July, 1909. McTighe had given his notes, which I am going to assume were lien-notes, as the purchase-price of this outfit. The instrument referred to is as follows:—

"Guernsey, Sask., July 28th, 1909.

"These articles of agreement made in duplicate this 28th day of July in the year 1909, between Frank B. McTighe, of the post office of Guernsey, in the province of Saskatchewan, farmer, hereinafter called the vendor, of the first part, and Sidney Eldred, of the same place, farmer, hereinafter called the purchaser, of the second part, witness: Whereas the said vendor has agreed to sell to the purchaser and the purchaser has agreed to purchase of and from the said vendor all and singular the tubular well-drilling machine with all its attachments and the ten h.p. Stickney gasoline engine with all its attachments, tools, and all such equipment as belong to the said drilling outfit, for and in consideration of the sum of one dollar and other valuable considerations, that is, that the purchaser to assume all the notes given by the vendor to the Ontario Wind Engine and Pump Co. in payment for the above-mentioned drilling outfit. The time on the first note which was due on July 10th is extended for sixty days.

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"The purchaser will assume all the notes and will take possession and operate the said outfit as soon as the Ontario Wind Engine and Pump Co. will furnish a competent man to assist the purchaser to complete the first well. The purchaser to pay said man at a rate not to exceed five dollars a day in assisting to drill the first well.

"In witness whereof the vendor and the purchaser have hereunto set their hands and seals the day and year first above written.

"Signed, sealed and delivered
in the presence of

"Sidney Eldred (L.S.)

"S. B. Biehn."

"Frank B. McTighe" (L.S.)

No objection was raised that the outfit was not a good one and suitable for the purpose for which it was sold.

Now it will be seen, in the first place, that this machine was not purchased by the defendant from the plaintiffs but from McTighe. It is true that the company agreed to accept the lien-notes in question in substitution for those of McTighe. One McDonald, an agent of the company, came up and approved of the transaction, and the defendant gave the notes in question then, and the mortgage which has been referred to, and took possession of the outfit and commenced to work it at the place of one Behn, where it was standing at the time the arrangement between the defendant and McTighe was made.

I will stop here now to discuss further the question of law that is raised. I cannot bring my mind to the conclusion that, under such circumstances, there was any offence proved or to be implied on the part of the plaintiffs against the provisions of sec. 3 of the Foreign Companies Act, R. S. Sask. ch. 73..

It was urged that, under Bank of Montreal v. Bethune, 4 O. S. 341, and some other cases decided subsequently thereto in Upper Canada, at common law a corporation could not carry on business in that province, unless there was some special authority to do so. These cases, however, are overruled by clear implication by Canadian Pacific R. W. Co. v. Western Union Telegraph Co., 17 S. C. R. 151, wherein Sir William Ritchie, C.J., at p. 155, states as follows: "The comity of nations distinctly recog-

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nises the right of foreign incorporated companies to carry on business and make contracts outside of the country in which they are incorporated, if consistent with the purposes of the corporation and not prohibited by its charter, and not inconsistent with the local laws of the country in which the business was carried on, subject always to the restrictions and burthens imposed by the laws enforced therein; for there can be no doubt that a State may prohibit foreign corporations from transacting any business whatever, or it may permit them to do so upon such terms and conditions as it may prescribe."

The only question raised in this case is whether these plaintiffs are prohibited by sec. 3 of the Foreign Companies Act and the authorities from suing upon the notes in question. I feel very clear that I must not assume that these plaintiffs were acting illegally: that would not be assumed, even if they were being prosecuted under the Act. For all I know to the contrary, the outfit may have been sold in Winnipeg to McTighe and delivered there to him, possibly personally, or to a carrier there, which would be equivalent to a delivery to McTighe there. I must, in the absence of evidence to the contrary, assume omnia acta rite, and I must presume that they are seeking to recover a debt which they are legally authorised to recover, unless the contrary is proved. The section of the Act in question provides in the first paragraph that no foreign company having gain for its object or a part of its object shall carry on any part of its business in Saskatchewan unless it is duly registered; and then the second paragraph provides: "Any unregistered company carrying on business . . . shall be liable on summary conviction to a penalty of $50 for every day on which such business is carried on in contravention of this section." It is intended by the second paragraph to make a person carrying on business contrary to the first paragraph liable to a penalty, that is, carrying on business having gain for its object. In my judgment, it was not the intention of the legislature to provide that, if a person contracts with, say, a Manitoba company, at Winnipeg, for the purchase of an article there, the company will not have a remedy to recover the purchase-price in this province or to secure themselves by notes or other securities. I will even go so far as to say that where a person living in this province forwards an order to a Manitoba company at Winnipeg to

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send an article to him, and that order is accepted and the article shipped, that is not carrying on business for gain in this province. The order may be dated here, but it is received at Winnipeg, and when the article is shipped, the contract is complete there; the company have done nothing contrary to the laws of this province. If a company, however, not being duly licensed, open an office in this province or send their agents through the province to canvass, or commit acts of a like character, then they bring themselves within the provisions of the section and are liable to a penalty. I may say that the plaintiffs' counsel offered in evidence the order given by McTighe to the plaintiffs for the outfit, but it was rejected (I now think improperly) on objection taken to its admission by the defendant's counsel. It is only necessary for me to say that the defendant has not brought this company, so far as this transaction is concerned—and that is all I have to deal with—within the purview of the law; and, therefore, the objection of law so raised is not well taken.

There is a good deal of conflict of testimony as to what took place at the time these notes were signed; but that the notes were signed, is clear; that they were signed for the purpose of carrying out the agreement with McTighe, in so far as the defendant was concerned, and that the plaintiffs were willing to accept him instead of McTighe, is equally clear. I am of opinion, even if the facts set up by the defendant are true, that it is not open to him to set up a verbal arrangement such as he attempted to set up in answer to the plaintiffs' right to recover on such notes. The testimony on the part of the defendant was, in substance, that at the time of the signing of the notes (whether before of after does not appear from the evidence on behalf of the defendant), one McDonald, an agent of the plaintiffs, agreed to send him an expert, for whose services the defendant was to pay, to assist him in completing the first well he dug in 1909; that he was to stay with him until such well was completed; and, if not completed, the notes would be void. McDonald swore that the conversation about the expert was after the notes were signed, and I find that to be the fact. The well was never completed. Such an agreement would be utterly at variance with the notes. I find, however, that this arrangement, as stated by the defendant, was not made; there was no arrangement that the expert should remain until the well

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was completed, and that, if not completed, the notes were to be void. McDonald absolutely denied that anything of that sort was arranged. He says he did consent and agree to send an expert to assist the defendant and shew him how to work the outfit, and that the defendant was to pay for the services of such man. It seems to me utterly incredible that McDonald would agree to relieve the defendant from all liability if the well was not completed, and I say this especially when I consider the great uncertainty of finding water when drilling for it. This case illustrates it. The expert came, but he only remained there ten or twelve days, and then went away. He went down 250 feet before he went away, and two or three men came afterwards, who worked at it for 37½ days, and no one ever got below the 250 feet; and, as before stated, there was nothing wrong with the machine nor with the skill of the workmen or their ability to do the work, so far as the evidence shews.

There will be judgment for the plaintiffs on the claim for the full amount of the claim and costs. The Local Registrar will figure up the amount of principal and interest due on the notes and enter judgment accordingly. There will be also judgment for the plaintiffs on the counterclaim, with costs.

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THE

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## SASKATCHEWAN.

APRIL 4TH, 1912.

SUPREME COURT EN BANC.

## GORDON v. CANADIAN NORTHERN R. W. CO.

*Master and Servant—Injury to Servant—Railway—Collision—Gross Negligence—Workman in Train to be Carried Home after Completion of Work—Invitation—Common Interest—Duty of Railway Company—Licensee—Findings of Jury—Quantum of Damages.*

A conductor of one of the defendants' freight trains hired the plaintiff to assist in digging a train out of the snow, undertaking to take the plaintiff out from his home to the place where the train was snowed up and bring him back. When the plaintiff had finished his work, the conductor invited him into the caboose of the train, to be taken back to his home. While the plaintiff was in the caboose, another train of the defendants ran into it, and the plaintiff was severely injured. In an action for damages for the plaintiff's injuries, the jury found that the collision occurred through the negligence of the defendants or their servants. One of the questions submitted to the jury was: "Was he (the plaintiff) in the caboose at said time during and in consequence of his employment?" to which the jury answered, "Yes, in consequence of his employment:"—

*Held*, that, if, when the plaintiff was injured, he was still in the employment of the defendants, he was entitled to recover, because the defendants owed him a duty to see that he was not injured by their negligence or that of their servants—the defence of common employment not being open to the defendants under R. S. Sask. ch. 52, sec. 31, sub-sec. 14.

But, assuming that the plaintiff's employment had ceased before the collision, the plaintiff was in the caboose by the express invitation of the conductor (and want of authority on the part of the conductor was not alleged or proved); the plaintiff was there, as the jury found, in consequence of his employment; he was, therefore, lawfully there, not as a guest nor yet as a mere or bare licensee, but in consequence of his contract of employment; he was there in the common interest of himself and the defendants; and the defendants owed him the duty of taking reasonable care that he was not injured through the negligence of their servants, and were liable to him in damages for the breach of that duty.



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**And *semble*, that, even if this relationship had not existed—if the plaintiff had no higher right than that of a bare licensee—he would still be entitled to recover, because the injuries received by him were not the result of any dangers incident to his entering upon the defendants' property, but were caused by a wrongful act of the defendants' servant, amounting to the grossest kind of negligence.**

**Review of the authorities.**

***Held*, also (WETMORE, C.J., dissenting), that the damages awarded for the plaintiff's injuries ($10,000) were not so excessive as to warrant the Court in interfering with the verdict.**

***Per* WETMORE, C.J., that the damages were so large that twelve reasonable men could not have given them.**

Appeal by the defendants from the judgment of BROWN, J., in favour of the plaintiff, upon the findings of a jury, for the recovery of $10,000, in an action for damages for injuries sustained by the plaintiff by reason of the negligence of the defendants' servants, as alleged.

The appeal was heard by WETMORE, C.J., NEWLANDS, JOHNSTONE, and LAMONT, JJ.

O. H. Clark, K.C., and J. H. Lindsay, for the defendants.

A. E. Doak, for the plaintiff.

LAMONT, J.:—This is an action for damages for personal injuries received through the negligence of the defendants' servants. The plaintiff was hired along with a number of others by the conductor of one of the defendants' freight trains to go out and help dig a freight train out of the snow. In the negotiations for hiring, the plaintiff asked the conductor if he would have to walk out to the place where the train was stalled, and the conductor said: "No, we will take you up on the engine and bring you back to town." The plaintiff, with the others, was conveyed by the conductor on an engine to the point at which the train was stalled. After they had finished digging out the train, the conductor said to them: "Boys, if you are through with the work come inside and warm yourselves, and we will go back to the station." The place into which he thus invited them was the caboose of the freight train. They went in. A few minutes afterwards, the caboose was run into by the defendants' passenger train.

As a result of the collision, the plaintiff was knocked down by the coal-heater of the caboose, and for the moment rendered unconscious; the burning coals were spilled over him, and the caboose set on fire. The plaintiff was severely burned about the head and face, and

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his right hand was so badly burned that the muscles of the fingers were destroyed. The only muscle of the hand not completely destroyed was that of the thumb, which is still capable of a slight movement.

The crew of the passenger train had been notified at Melford that a freight was stalled in the snow ahead, and that they were to go slowly beyond a certain point and look out for the freight. The jury found that the collision occurred through the negligence of the defendants or their servants, the crew of the passenger train, in not obeying their orders, and assessed the damages at $10,000, and judgment was entered by my brother Brown for that amount. From that judgment the defendants now appeal to this Court.

Counsel for the defendants seeks to set aside the judgment for two reasons. In the first place, he contends that the plaintiff cannot recover unless he was in the employment of the defendants at the time the accident occurred, and that the plaintiff's statement of claim and the answers of the jury shew that his employment was at an end when the accident happened. In his statement of claim, the plaintiff, after setting out that he had been employed to assist in removing an accumulation of snow from the defendants' right of way, alleged that "the plaintiff did perform the work and services which he was employed to perform, and after performing the same did, at the request and invitation of the defendant company, its servants and employees, enter the caboose for the purpose of returning to Star City." At the close of the evidence, the plaintiff's counsel asked to be allowed to amend the claim by alleging that it was part of the agreement of hiring that the defendants should return the plaintiff to Star City. The application was refused. One of the questions submitted to the jury was: "Was he (the plaintiff) in the caboose at said time during and in consequence of his employment?" to which the jury answered, "Yes, in consequence of his employment." From this, counsel for the defendants argued that the jury held that he was not there *during* his employment. The evidence satisfies me that, under the contract of hiring, there was an obligation resting upon the defendants to convey the plaintiff back to Star City. In the view, however, which I take of the case, it is immaterial whether the action is founded in contract or in tort. If, when the plaintiff was injured,

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he was still in the employment of the defendants, he is entitled to recover, because the defendants owed him a duty to see that he was not injured by their negligence or that of their servants; the defence that the negligence of a fellow-servant engaged in a common employment was one of the risks undertaken by the plaintiff not being open to the defendants under our statute, R. S. Sask. ch. 52, sec. 31, sub-sec. 14.

Then assuming, as contended by counsel for the defendants, that the plaintiff's employment had ceased prior to the accident, we have to inquire as to the relationship existing between the parties at the time the accident happened, and the duty, if any, which that relationship imposed upon the defendants. The plaintiff was in the caboose at the time he was injured by reason of the express invitation of the defendants, through their conductor. Neither in the pleadings nor in the Court below, nor yet in their notice of appeal, did the defendants set up that the conductor had no authority to so invite him. An attempt was made on the argument before us to amend by setting up that contention, but the Court refused to allow it. Not only was the plaintiff in the caboose by express invitation of the defendants, but he was there, as the jury found, in consequence of his employment, and had there been no express invitation given him to enter the caboose to be transported back to Star City, I am of opinion that an invitation would necessarily be implied under the circumstances. The plaintiff was, therefore, lawfully in the caboose, not as a guest nor yet as a mere or bare licensee, but in consequence of his contract of employment with the defendants.

In Indermaur v. Dames, L. R. 2 C. P. 312, Kelly, C.B., in giving the judgment of the Court of Exchequer Chamber, said: "I own I do not see any distinction between the case of a workman going upon the premises to perform his employer's contract, and that of his going after the contract is completed, but for a purpose incidental to the contract, and so intimately connected with it, that few contracts are completed without a similar act being done."

In view of this relationship, which, I hold, existed, what was the duty of the defendants towards the plaintiff? The duty of a railway company to a person upon their property by their invitation, express or implied, and their liability for injuries received by such person while on such premises,

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have been the subject of many judicial decisions. The law, as I gather it from the cases, may be stated as follows:—

If the plaintiff is a bare licensee—that is, one who is permitted to go upon premises of another solely for his own interest, convenience, or gratification—he takes the property as he finds it, with all the risks incident thereto, subject, however, to this, that he must not be led into danger by anything in the nature of a trap, nor must he be injured by any wrongful act on the part of the company or their servants amounting to gross negligence: Gautret v. Egerton, L. R. 2 C. P. 371; Harris v. Perry & Co., [1903] 2 K. B. 219; Nightingale v. Union Colliery Co., 35 S. C. R. 65.

But, if the plaintiff is not a mere or bare licensee, but is lawfully on the company's premises by the company's invitation, on a matter of common interest, or in the exercise of a right, the company owe him the duty of taking reasonable care that he is not injured through the negligence of their servants; and, if he is thus injured, the company are liable to him in damages: Indermaur v. Dames, L. R. 1 C. P. 274; Wright v. London and North Eastern R. W. Co., 1 Q. B. D. 252; Thatcher v. Great Western R. W. Co., 10 Times L. R. 13; Marney v. Scott, [1899] 1 Q. B. 986.

In the present case, the plaintiff, as I have said, comes within the latter class. His employment by the defendants was a matter of common interest to both, and his being in the defendants' caboose when he was injured was in consequence of and as incident to that employment, and it was solely on account of that employment that he received the invitation to enter the caboose. He was, therefore, on the defendants' premises on a matter of common interest to both parties, and the defendants owed to him, under the authorities above referred to, the duty of taking reasonable care to keep the premises in a safe condition. That duty they did not perform, and must be held accountable for the injuries received by him.

But, even if this relationship had not existed—if the plaintiff had no higher right than that of a bare licensee—he would, in my opinion, still be entitled to recover, because the injuries received by him were not the result of any dangers incident to his entering upon the defendants' property, but were caused by a wrongful act of the defendants' servants on the passenger train, amounting to the grossest kind of negligence. The passenger crew had been notified

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that a freight train was ahead of them, stalled in the snow; they had been given orders to go slowly from a certain point and to protect the stalled train. Instead of doing this, they proceeded at full speed until they crashed into the caboose. A more glaring example of gross negligence it would be hard to imagine. A bare licensee in going into the defendants' caboose must assume all the risks incident thereto; but surely it cannot be said that one of the risks incident thereto, and which he assumes, is, that he may be run down by a train following the one he has entered upon.

However, as I have already stated, the plaintiff was not simply a bare licensee, but a licensee by express invitation, and also on a matter of common interest, and is on that account entitled to recover for the injuries sustained.

The other ground on which the judgment appealed from is sought to be set aside is, that the damages awarded are excessive. On this point I do not know that I can add anything to what I have just said in Tobin v. Canadian Pacific R. W. Co., ante 676. Neither in the notice of appeal nor in the argument before us was any objection taken to the learned trial Judge's charge, nor was it contended that the jury had assessed the damages on any wrong principle. As I said in the Tobin case, the question then is, are the damages awarded so unreasonably large that twelve sensible men, assessing damages on proper principles, could not reasonably have allowed them? If not, can we say that the sum awarded is such that, after making a proper allowance for the pain and suffering of the plaintiff and the diminution of his capacity for the enjoyment of life, it would purchase an annuity equal to the difference between the prospective earnings of the plaintiff if he had been uninjured and those earnings after his injury? If we can, then a new trial should be ordered: Johnston v. Great Western R. W. Co., [1904] 2 K. B. 250. If we cannot, there does not seem to be any ground on which to justify interference by an appellate Court. The only limit placed upon the amount that may be awarded is, that it must be reasonable. The plaintiff, as a result of his injuries, was in the hospital between sixteen and seventeen weeks; and, from the character of his injuries, necessarily suffered great pain. He was burned very severely about the head and face. The skin was to a great extent burnt off his face, with the result that he is now very badly disfigured, and his face and the top of his

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head are so tender that he may not be able to stand either extreme heat or cold. This will certainly interfere with his enjoyment of life. In addition, his nose and jaw were broken, and his right hand was so badly burned that it is practically of no use. He is a young man, twenty-six years of age, and a blacksmith by trade. He has followed his trade for the last twelve years. As a blacksmith, he earned $3.50 per day when working for others. About two months before the accident, he started business for himself in partnership, and was averaging $35 per week. One difficulty I experience in cases such as this is, that there is no evidence whatever given from which either a Court or jury can ascertain what annuity can be purchased for a given sum; and in this province the purchase of annuities is so rare that not one person in fifty has any knowledge on the point. Another difficulty in this case is, that at the trial stress was laid upon the disfigurement of the plaintiff's face. It is certainly an element of damage to be considered; and, the jury having seen the disfigurement, and this Court not having done so, I cannot escape the conviction that the jury were in a better position to appraise the damage than I am. Then there is the difficulty of estimating his probable future earnings. If the plaintiff had the proper mental equipment, he might, even in his disabled condition, go into some walk of life requiring mental alertness rather than manual labour, and make a good living; but, if he is qualified only to earn an income by manual labour, it will not be denied that a man with only one hand is in a very unfortunate position. He cannot, of course, continue at his business of blacksmithing. The evidence shewed that he had entered for a homestead, and that he would be able to do something on the farm. Upon these points, also, the jurors, a number of whom doubtless were farmers, were, it seems to me, in as good if not a much better position that I am to estimate the plaintiff's earning capacity. Further, it must not be forgotten that it is rarely that any two Judges or any two juries award the same amount. On the whole, there is no evidence upon which I can say that the rule as laid down in Rowley v. London and North Eastern R. W. Co., 8 Ex. 221, and Johnston v. Great Western R. W. Co., supra, has been infringed; nor am I prepared to say that twelve sensible men might not reasonably have given the amount awarded.

I would dismiss the appeal with costs.

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NEWLANDS, J.:—I agree with my brother Lamont's judgment; and, in addition to the authorities he has referred to, would point out that the case of Holmes v. Great Northern R. W. Co., [1900] 2 Q. B. 409, cited by Mr. Clark for the appellants, is almost identical with the present case, with the exception that there he was injured before, and in this case after, his work. On p. 411 A. L. Smith, L.J., says: "The deceased was admittedly employed by the appellants. They had started a new goods-shed at Hornsey, and he had been told to go there and clean engines; it was his duty to obey the order. He was taken there for nothing by the appellants in one of their trains, and he undoubtedly went there on the business of his employers; he arrived there a quarter of an hour before his actual work started in the shed, and in crossing the line to get to the shed he was run over. Under those circumstances, was the learned County Court Judge justified in finding that the accident arose out of and in the course of the employment of the deceased? I am of opinion that he was. It must be borne in mind that there is a difference between the beginning of a man's employment and the beginning of his work; for instance, in a coal-pit the employment begins as soon as the miner leaves the bank, although he may have some distance to go to his actual work after he has got down the pit. In the present case I think there was satisfactory proof of an implied contract on the part of the appellants to take the deceased from King's Cross to Hornsey, there to find him work, and to take him back again when his day's work was over. Then comes the question, was the deceased being employed on the railway at the time of the accident? In my opinion he was."

In this case the plaintiff's work was completed, but his employment was not at an end, because the defendants agreed to take him back to Star City, and he was injured by them while still in their employment, he being in the caboose waiting to be taken back.

He having been injured by the negligence of the defendants' employees while in their employment, and there being no contributory negligence on his part, the defendants are liable.

JOHNSTONE, J., concurred.

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WETMORE, C.J.:—I concur in the judgment of my brother Lamont, which I have had the opportunity of reading, except in so far as the question of damages is concerned. I am of opinion that the damages are outrageously excessive. The matter of determining, in an action of this character, whether damages are excessive or not must, in my opinion, depend altogether upon the reasonableness of them; and I admit that that is a question upon which there may be a great difference of opinion. I adopt what was laid down by Lord Esher in Praed v. Graham, 24 Q. B. D. 53, cited in the judgment of my brother Lamont delivered at this sittings in Tobin v. Canadian Pacific R. W. Co., ante 676; and that is, that a new trial will not be granted because the damages are larger than the members of the Court would have given, but because they are so large that twelve sensible men could not reasonably have given them; and that is just the opinion that I have reached here—that these damages are so large that twelve reasonable men could not have given them. I know of no case binding upon me at present by which such damages are to be measured by a set rule. We have in this case $10,000 awarded to the plaintiff—an amount which, taking the average of the earning ability of persons in the plaintiff's employment or trade, would not probably be accumulated in the course of a long lifetime; and I, for one, am not disposed to encourage the idea that every time a person is injured, under circumstances which render a corporation liable, a small fortune is to be bestowed on the unfortunate victim of the accident. I recognise, however, the pain and suffering consequent upon such an accident, and that compensation should be given therefor. In this case, while the plaintiff was very badly injured, I would gather that he was not rendered incompetent for obtaining employment and earning a fair living. I cannot help but feel that corporations in matters of this sort are not fairly treated. In this case the defendants were not the parties actually guilty of the negligence. It was their servants, and especially the conductor and engineer of the passenger train, who were the actually guilty parties. The defendants are liable upon a well-known principle of law which makes an employer liable for the consequences of negligent acts by his servants. I do not find any fault with that law. I am now about to speak merely from conjecture, but at the same time as the result of experience, and I have no hesitation in

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stating that, if the conductor and the engineer, the parties so actually guilty of the negligence, had been the defendants in the place of the railway company, the jury would have hesitated before giving a verdict for half the amount which they did give in this case. This is the first opportunity that I have had of putting my opinions upon record in a question of this character; and, having done so, as a matter of course I shall hereafter feel myself bound, as I must be, loyally to follow the judgment of the majority of this Court, as expressed both in this case and in the Tobin case.

In my opinion, there should be a new trial, but solely on the question of excessive damages.

*Appeal dismissed;* WETMORE, C.J., *dissenting as to damages.*

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## MANITOBA.

APRIL 8TH, 1912.

COURT OF APPEAL.

## LAFVENDAL v. NORTHERN FOUNDRY CO.

*Master and Servant—Injury to Servant—Building Operations — Negligence — Defective System — Breaking of Joist — Res Ipsa Loquitur — Onus — Rebuttal of Presumption of Negligence—Reasonable Care in Selection of Material.*

The judgment of MATHERS, C.J.K.B., 19 W. L. R. 350, was reversed, upon the facts found, and judgment was given for the plaintiff for $7,000 damages.

*Held*, that the defendants owed a duty to the plaintiff to provide a reasonably safe place in which to work and reasonably safe materials for a dangerous work such as he was engaged in; and for breach of that duty the plaintiff was entitled to recover.

Appeal by the plaintiff from the judgment of MATHERS, C.J.K.B., 19 W. L. R. 350.

The appeal was heard by HOWELL, C.J.M., RICHARDS, PERDUE, and CAMERON, JJ.A.

M. G. Macneill and B. L. Deacon, for the plaintiff.

R. M. Dennistoun, K.C., and K. R. M. Daly, for the defendants.

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HOWELL, C.J.M.:—The facts are fully set out in the judgment appealed from.

The joist which broke was intended to be placed, and was placed, amongst others, to span a distance of 20 feet from one iron beam to another up in the air 25 feet above ground These timbers (6 inches by 10 inches) were placed with their greatest width vertical, and about 3 feet from one another. It was intended that boards at right angles with the timbers should be placed upon them in part construction of the roof of the building. It was part of the system of construction that men should walk upon these timbers while being placed, and that in the construction of the roof men should be upon them for many purposes. It was contemplated and expected that men should use the timber to walk upon as the plaintiff did at the time of the accident.

The fact that a beam of British Columbia fir, 10 inches by 6 inches, broke when the weight of a single man was put upon it, shews that there was a serious defect in it, a defect which any reasonable test or even visual examination should have disclosed.

Applying the rules of res ipsa loquitur, there was evidence of negligence; but the learned Chief Justice found that the very slight evidence of inspection given at the trial satisfied the onus which was thrown upon the defendants.

It seems to me that when timbers are to be used to support a roof 25 feet from the ground, and that when they are to cover a span of 20 feet without support except at each end, it is not too much for workmen to expect that these timbers have first been tested by being stretched for that distance on the ground with no supports except at the ends and some reasonable weight put upon each. The defendants gave evidence that each timber was raised from the ground by a grab-hook around the centre, and that this was a test; but this joist, perhaps, was caught just at the diagonal crack and was possibly strengthened by the clamp. They also gave evidence that the man operating the hoist stepped on the centre of each timber after it was placed on the iron beams; but, as I read the evidence, I gather that the timbers were all brought up at one place, and then, by the plaintiff and a fellow workman, moved therefrom to their proper places, and perhaps the men piled several on each other. At all events, the timber, when placed in its proper position, broke when the plaintiff was properly using it as a

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means of egress. The evidence of Toye's inspection is to me of the most perfunctory kind, and he does not pretend to have examined the timbers to find or test their strength.

The trial Judge drew conclusions from established facts; but, with great deference, I would draw different conclusions. The defendants do not pretend that Toye, their foreman, was bound to do or should do more than he had done. Toye did not test the strength of these timbers, nor did the defendants employ any competent person to do this work.

I shall assume that the defendants intended the work to be done in the manner in which it was done; for, by their evidence, they do not pretend that any other system or methods of procedure should have been adopted. It is evident that the work which the plaintiff was called upon to perform was of a dangerous character; and I think that the defendants were called upon to take all reasonable precautions for the safety of the workmen.

In Brooks v. Fakkema, 44 S. C. R. 412, the system of working was to have a movable engine for the purpose of breaking jams in a logging slide. There was an experienced foreman in charge, who directed the changing of the position, from time to time, of this engine. It had been placed too near the slide, apparently by direction of the foreman, and a log jumped the slide and injured the plaintiff. It was held that the operations carried on were dangerous, and that the company were liable at common law, and could not be relieved by the employment of a competent foreman, because they had failed to provide a safe and proper place in which the employee could do his work.

Sir Louis Davies, in Ainslie v. McDougall, 42 S. C. R. at p. 424, uses the following language: "In other words, I hold that the right of the master, whether incorporated or not, to invoke the doctrine of common employment as a release from negligence for which he otherwise would be liable, cannot be extended to cases arising out of neglect of the master's primary duty of providing, in the first instance at least, fit and proper places for the workmen to work in, and a fit and proper system and suitable materials under and with which to work. Such a duty cannot be got rid of by delegating it to others."

All the authorities on this subject are referred to in these two cases, and need not be again discussed.

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The defendants' plan of building was to have these timbers span a space of 20 feet, at an elevation of 25 feet from the ground, expecting and intending to have men walk upon and work upon them, and made no provision for their strength being tested, otherwise than by a casual examination, by looking at them; and, I think, they are, therefore, liable at common law.

I think they are liable at common law even if Toye had been instructed to test the strength of each piece and had neglected to do so, for they owed a duty to the plaintiff to provide a reasonably safe place on which to work and reasonably safe materials in a work of such imminent danger.

As set forth in the judgment of the Chief Justice of the King's Bench, the plaintiff is a human wreck beyond any hope of recovery.

The judgment must be set aside and a verdict entered for the plaintiff, with costs of this appeal and of the trial. The damages are most difficult to assess; but, after careful consideration, they have been assessed at $7,000, and the judgment for the plaintiff will be for that amount with costs.

RICHARDS, J.A.:—The plaintiff was a workman in the employ of the defendants, his work consisting in the fixing in place of certain wooden joists which, at the height of about 25 feet from the ground, extended from one steel "I" beam to another, the "I" beams being 20 feet or thereabouts apart. The plaintiff worked on the "I" beam furthest from the only place provided for getting up to the "I" beams from the ground below, so that, when work ceased at dinner time, he was compelled, for lack of other means, to walk across one of these joists, to get to the place from which he could descend to the ground. These were 20 feet long, and only sustained by a few inches, at each end, resting on the "I" beams, there being no other support under them. Their dimensions were 10 inches by 6 inches, the 6-inch surface being uppermost. They had been freshly sawn on one 6-inch side and on one 10-inch side.

While he was thus crossing to go to his dinner, the joist on which he was walking broke under the plaintiff, so that he fell to the ground and was very seriously injured for life. The break extended through about six feet of the length of the joist, and the evidence seems to me conclusive that it

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must have happened because of the grain of the wood crossing from the upper to the lower side in that distance.

There were no ladders provided for the workmen to get up and down by. I cannot see that there would have been any inconvenience, or serious expense, if two ladders had been provided, one at each "I" beam, so that workmen would not need to walk upon the joists. It is said, however, that a break of this kind was such an extremely unusual thing that the need to provide ladders could not be foreseen by a reasonable person.

It seems to me that, because of the non-providing of ladders, or other means of getting down without crossing the joists, the defendants necessarily invited the plaintiff to use a joist as a means of crossing from one "I" beam to the other, in order to get off the building when work ceased. That being the case, I think that they made whatever joist might be used for that purpose, a part of their ways and system, and, in the present case, that part has turned out to be defective. If I am right in that, the employers are liable for the result of that defect. It is true that they could not tell in advance what joist would be so used, but they must have known that some joist would. It seems to me, therefore, that, as to each joist which could be so used, the defendants owed to the plaintiff the same duty that they would have, if they had said to him: "This joist is the one which we have provided for you to use in crossing from one 'I' beam to the other. It is part of our ways and system." I do not see how, in the absence of ladders or other means of descending, such a conclusion can be avoided.

If I am right in the above, the result is, that the defendants are in the same position as if they had provided the joist in question as part of their ways.

I have no doubt whatever that where the grain ran completely across the ten inches of depth of timber in six feet of its length, as it patently did in this case, that fact could have been seen by any one looking at is carefully; and, if it had been seen, it would be patent that it was not likely to be strong enough to carry the weight of a man crossing it, particularly when it would be strung over twenty feet with supports only at the ends, in which position its own weight, between the ends, would, in itself, be a serious load for so defective a timber to carry.

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The defect being thus in what was in effect part of the system of the defendants in connection with this work, there is, I think, a liability at common law. I do not see how they could avail themselves of what is known as the fellow-servant line of defence, even if they shewed, as they probably did, that Toye was a competent man to inspect timbers.

With every respect for the views of the learned trial Judge, I would allow the appeal.

CAMERON, J.A.:—The accident in this case was due to a defect in the joist which was not readily discernible by visual observation. Toye, the foreman, cannot say that he inspected this particular joist, but believes he saw them all. The learned Chief Justice found that this examination was sufficient to ascertain whether they were straight and of proper length, or had any other faults apparent to a person standing by and looking at them as they were being handled. At the trial an amendment was asked setting up a further act of negligence in the lack of proper inspection by the defendants of the joists before they were used. This amendment the Chief Justice would have allowed had he deemed it necessary in the interests of the plaintiff. The action was dismissed at the trial, for the reasons set out by the learned Chief Justice in his judgment.

The plaintiff moves to set aside the judgment, on the ground that the defendants were negligent in not furnishing scaffolding or ladders to enable the plaintiff to safely reach the work assigned to him, and in not providing a reasonable system of inspection of the joists, when it was known to the defendants for what purposes they were to be used. In point of fact, the joists were not only for the purpose of sustaining the roof of the building, but were also used for the purpose of enabling the workmen, employed in the work in which the plaintiff was engaged, to go to and to come from this work. As the joists were twenty-five feet above the level of the ground, it is clear that a much greater degree of care with reference to their soundness and suitability would have to be taken than if they were to be used to support flooring one or two feet above the ground level.

The plaintiff's counsel urged that the inspection made in this case was really no inspection at all. When the timber was delivered at the building from the mill where it was sawn, Toye says, he usually stood by when it was unloaded

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for the purpose of seeing that it was "all right." I extract from the evidence:—

"Q. Was there any examination made of that timber on arrival? A. Well, I looked over the timber as it was being unloaded myself. I did'nt take the timber and put any applied pressure on it to see what it would stand. I didn't think it was necessary.

"Q. What did you do? A. I simply used my eyes."

The timber was then cut to the proper length, carried to the proper place, and caught by a grab-hook and hoisted into place on the top of the "I" beams. Later in his evidence Toye gives an account of what he saw after the timber was broken. In the centre of the timber he found an old pitch pocket, which he says was not apparent from the outside, but this, he says, was not sufficient to cause the break.

Mr. Bruce, an architect, in answer to a hypothetical question, stated in terms of the facts here, said that a defect of this kind would easily be seen before the timber was laid if there was a foreman in charge.

Peppiatt, one of the workmen whose duty it was to cut the timbers to their proper length, says there was no inspection; that, as soon as the timbers were cut, they were hoisted up "as fast as we could do it, and in fact faster than we could do it, the two of us."

As between himself and his servants, the master is bound to exercise due care in selecting proper and competent persons for the work (whether as fellow-workmen in the ordinary sense, or as superintendents or foremen), and to furnish suitable means and resources to accomplish the work: Pollock on Torts, p. 102.

This statement is largely founded on Lord Chancellor Cairns's dictum in Wilson v. Merry (1868), L. R. 1 Sc. & D. 326, at p. 333: "If they (the jury) were of opinion that the respondents exercised due care in selecting proper and competent persons for the work and furnished them with suitable means and resources to accomplish the work, the respondents were not liable to the appellant for the consequences of the accident." It had been previously held (1861) by Lord Wensleydale, that the master is bound "to provide machinery fit and proper for the work and to take care to have it superintended by himself or his workmen in a fit and proper manner:" Weekes v. Mathieson, 4 Macq. 227.

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The master is not liable for the negligence of his superintendent, but he is bound to see that his works are suitable for the operations he carries on at them; and he cannot, by leaving the supervision of his works to his superintendent, escape liability: Beven on Negligence, p. 611. "If the appliances he supplies are not reasonably suitable, the neglect is the master's." That this was the law before Smith v. Baker, [1891] A. C. 332, may have been arguable; but is so no longer in view of the dictum of Lord Watson in that case that "a master is responsible in point of law, not only for a defect on his part in providing good and sufficient apparatus, but also for his failure to see that the apparatus is properly used." The duty of the master to secure an efficient scheme and appliances is, therefore, indefeasible and incapable of being delegated.

"The doctrine is now regarded as axiomatic that the employer is bound to furnish adequate materials and means and resources suitable to accomplish the work: that is to say, all that is necessary to carry on the business, including premises reasonably safe for that purpose:" Labatt on Master and Servant, p. 46, where there is given a valuable list of epithets and phrases used by the Courts to designate the obligatory quality of the instrumentalities which the master is to furnish.

I refer also to the cases of Brooks v. Fakkema, 44 S. C. R. 412, and Ainslie v. McDougall, 42 S. C. R. 424, where the master's duty to provide fit and proper places for the workmen to work in and suitable materials to work with and the impossibility of his divesting himself of the responsibility thereby imposed on him, are clearly set forth.

I have read the judgment of the Chief Justice and agree with his reasoning and conclusions that the appeal must be allowed.

PERDUE, J.A., concurred.

*Appeal allowed.*



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## MANITOBA.

APRIL 8TH, 1912.

COURT OF APPEAL.

## CONLEY v. PATERSON.

*Vendor and Purchaser—Contract for Sale of Land—Establishment of Contract—Statute of Frauds—Memorandum in Writing Signed by Agents of Vendor — Vendor not Named but Sale Made "Subject to Approval of Owner" —Reference to Further Agreement of Sale—Evidence of Approval of Owner—Specific Performance.*

The plaintiff paid $500 to the agents of the defendant and took from them a written receipt signed by them for that sum, "being deposit and part payment on the purchase of lot 1," describing it, "which Mr. C." (the plaintiff) "agrees to purchase on the following terms:—The consideration to be $8,500; $1,500, including the above deposit, to be paid in cash on execution of the necessary agreement of sale." The other terms of the purchase were then set out; and it was stated that "the sale is made subject to the approval of the owner." The agent, at the same time, obtained from the plaintiff an agreement in writing to purchase on the terms set forth. The defendant was not named as vendor, but it was shewn that he approved of the sale:—

*Held*, that there was an agreement sufficient to satisfy the requirements of the Statute of Frauds.

The signing by the agents, for the owner, was sufficient.

*Rossiter* v. *Miller*, 3 App. Cas. 1140, followed.

The reference in the writing to "the necessary agreement of sale" was to be explained by the fact that the defendant was still to approve of the terms. There was no suggestion that any new term was to be introduced. Upon the defendant giving his assent to the terms contained in the writing, "the necessary agreement of sale" was complete and could be enforced.

*Winn* v. *Bull*, 7 Ch. D. at p. 32, followed.

Judgment of MACDONALD, J., decreeing specific performance, affirmed.

Appeal by the defendants from the judgment of MACDONALD, J., in favour of the plaintiff, in a purchaser's action for specific performance of an agreement for the sale of land.

The appeal was heard by HOWELL, C.J.M., RICHARDS, PERDUE, and CAMERON, JJ.A.

A. C. Galt, K.C., and C. S. Tupper, for the defendants.

J. E. O'Connor and A. K. Dysart, for the plaintiff.

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PERDUE, J.A.:—This is an action by the purchaser for specific performance of an agreement for the sale of a piece of land in the city of Winnipeg. The action is brought against Herbert Paterson, Heubach, Finklestein, & Heubach, and Black, Young, and Jameson. The defendants Black, Young, and Jameson are the executors and trustees under the will of the deceased father of the defendant Paterson; and the last-named defendant is the beneficial owner of the land.

On the 18th January, 1911, the other defendants, Heubach, Finklestein, & Heubach, real estate agents, gave to the plaintiff a document, of which the following is a copy:—

"January 18th, 1911.

"Received from George H. Conley, commercial traveller, Winnipeg, the sum of $500, being deposit and part payment on the purchase of lot 1, D. G. S., 1 Saint John, plan 790, with house erected thereon and known as number 1 Saint Mary's Place, which Mr. Conley agrees to purchase, on the following terms:—

"The consideration to be $8,500; $1,500, including the above deposit, to be paid in cash on execution of the necessary agreement of sale; $3,000 by the purchaser assuming and agreeing to pay mortgage for that amount to be placed upon the property forthwith by the vendor, such mortgage to bear interest at the rate of 7 per cent. per annum. The whole of said principal to be repayable at the end of 5 years from date hereof; interest half-yearly on the 1st of July and the 1st of January in each year; $4,000 to be paid in consecutive half-yearly payments of not less than $330. The first of such payments to become due and payable on the 1st day of July, 1911, together with interest at the rate of 6 per cent. per annum.

"The purchaser to have the privilege of paying the whole or any additional amount on account of this sum of $4,000 without notice or bonus. Taxes and rent to be adjusted to date of sale hereon. The sale is made subject to the approval of the owner.

"Heubach, Finklestein, & Heubach,
"Agents for owner,
"per T. D. Whiting."

At the same time, they obtained from the plaintiff an agreement in writing to purchase on these terms.

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At the trial the action was dismissed as against the defendants Heubach, Finkelstein, & Heubach.

From what was proved in the evidence or admitted in the pleadings the following facts are established:—

1. On the 18th January, 1911, Heubach, Finkelstein, & Heubach, as agents of Paterson, agreed to sell the land to the plaintiff, at a price named and on terms and conditions set forth, subject to the approval of the owner, meaning by "owner" the defendant Paterson.

2. The plaintiff paid at the time $500, and was given a receipt in writing by Heubach, Finkelstein, & Heubach, which set out the terms of the sale, and was signed by them as "agents for owner."

3. The title to the land stood in the names of the defendants Black, Young, and Jameson, who resided in Scotland, and who held the land as trustees for Paterson subject to a claim of about $3,000, on payment of which they were willing to convey the land to Paterson.

4. Heubach, Finkelstein, & Heubach, as admitted in the statement of defence, "duly submitted the said offer to the defendant Paterson."

5. Paterson approved of the sale and requested the Winnipeg solicitor of the trustees to procure a transfer from the trustees.

6. The solicitor for the trustees prepared and forwarded to them an agreement of sale to be executed by them. This, although embodying the terms mentioned in the receipt, contained a number of provisions not referred to in the receipt.

7. The agreement so forwarded contained, by an error, a provision that the trustees should sign a mortgage for $3,000. This was contrary to the terms contained in the receipt, which clearly intended that Paterson should sign such mortgage, the object being to raise money to pay off the trustees.

8. By reason of the term providing that they should sign a mortgage, the trustees refused to execute the agreement.

9. The trustees were willing to convey the land to Paterson, on being paid the amount due to them, and they proposed that he should carry out the sale himself, raising money to pay them off.

10 While matters were in this position, circumstances arose which caused a great advance in the value of land. Finkelstein, one of the partners in the firm of Heubach,

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Finkelstein, & Heubach, thereupon wrote to Paterson as follows: "Regarding house No. 1, St. Mary's Place, I find that somebody is buying up the property around your house, and I think that in all probability, if I am not tied up to the man with whom I was previously dealing, that is, the man who made us the offer which we sent to you, I will be able to get a great deal more for the property. I am, therefore, refusing on your behalf to carry out the transaction as outlined in our previous letters, as I feel that the people who are now buying the property will need it badly enough to pay many thousands more; in fact, I think we could get nearly twice as much as we formerly expected to get."

11. The defendant Paterson then refused to carry out the sale.

I think there was an agreement sufficient to satisfy the requirements of the Statute of Frauds. The signing by Huebach, Finkelstein, & Heubach, as agents for the owner, was sufficient: Rossiter v. Miller, 3 App. Cas. 1140.

The only question of real importance that arises in the cases is in reference to the provision, "$1,500, including the above deposit, to be paid in cash on execution of the necessary agreement of sale." It is urged that this provision shewed that the receipt signed by Paterson's agents was intended only to indicate terms which might form the basis of a contract, but that the real contract was still to be settled and agreed upon.

The receipt which was given by Paterson's agents to the plaintiff contained all the terms of the contract. The writing contained sufficient, and was sufficiently executed, to satisfy the Statute of Frauds. The reference in the writing to "the necessary agreement of sale" can be explained by the fact that Paterson was still to approve of the terms; and, on his doing so, it may have been contemplated that some document more formal in its nature, but containing the same terms, might be signed by both the parties. There is no suggestion that any new term was to be introduced. It is true that the payment of $1,500 is to be made "in cash on the execution of the necessary agreement of sale; but, upon Paterson giving his assent to the terms contained in the writing, the necessary agreement of sale was complete and could be enforced. It is to be observed that the mortgage to be put on the property is payable at the end of five years from the date of the receipt. I would take it that the term

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"the necessary agreement of sale" referred to Paterson's approval and acceptance of the sale made by his agents, in the absence of a more formal agreement taking its place.

The law upon this point is summarised by Jessel, M.R., as follows: "It comes, therefore, to this, that where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says: it is subject to and is dependent upon a formal contract being prepared. When it is not expressly stated to be subject to a formal contract, it becomes a question of construction whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement, the terms of which are not expressed in detail:" Winn v. Bull, 7 Ch. D. at p. 32.

In Rossiter v. Miller, 3 App. Cas. at p. 1152, Lord Blackburn says: "I think the decisions settle that it is a question of construction whether the parties finally agreed to be bound by the terms, though they were subsequently to have a formal agreement drawn up." See also North v. Percival, [1898] 2 Ch. 128.

I think there was a concluded agreement in the present case which both vendor and purchaser had accepted. There was no term or condition remaining to be settled Everything had been agreed to and put in writing. The agents may have thought a formal agreement necessary; but it was not necessary if every term and condition of the sale was already in writing signed by the parties, as was the case here. The only thing that disturbed the harmony of the transaction was the sudden increase in the value of the land. Then the vendor, at the instigation of his agents, sought to repudiate the sale, in the expectation of getting a higher price.

I think the appeal should be dismissed with costs.

CAMERON, J.A.:—In my opinion, there is a good deal to be said for the appellants' contention that the offer made by the plaintiff to Heubach & Co. was not the offer which Heubach & Co. transmitted to Paterson for his acceptance, in their letter of the 20th January, 1911. The following points of difference (of varying degrees of importance) appear: (1) The letter says $1,500 is to be paid in cash "as soon as the sale has been accepted by you." The receipt, however, says it is to be paid "on execution of the neces-

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sary agreement of sale." (2) The letter says the purchaser is to pay a mortgage to be placed on the property "by you." The receipt says "by the vendor." (3) The receipt says: "The whole of said principal to be repayable at the end of 5 years from date hereof, interest half-yearly on the 1st of July and 1st of January in each year." This is not to be found in the letter at all. (4) The word "consecutive" is found before the word "semi-annual" in the receipt, but not in the letter. (5) The receipt says that the first of the half-yearly payments is "to become due and payable on the 1st day of July, 1911." This is not expressly stated in the letter. (6) The receipt gives the purchaser the privilege of prepaying principal "without notice or bonus," but this ("without notice or bonus") is not stated in the letter. (7) According to the receipt, "The sale is made subject to the approval of the owner." But the letter says "The sale being made already, subject to your approval."

These variations might be considered sufficient to support the argument that the offer submitted to Paterson was not the offer made to, and conditionally accepted by, Heubach & Co.; that the minds of the parties never came together; and that, therefore, there was no contract. But the defence has not made it a point to insist upon this view, as the admissions made in the statement of defence, in paragraphs 3 and 5 (in which it is stated that the agents duly submitted the said offer), apparently preclude this contention. It is further to be noted that paragraph 9 of the statement of claim (which is admitted by the defence) states that Paterson is the beneficial owner of the land in question, and that the land (of which a full description is given) was agreed to be sold to the plaintiff.

The first objection taken to the judgment, that the vendor is not named in the offer, and that the contract is, therefore, insufficient under Jarrett v. Hunter, 34 Ch. D. 184, must fail, in view of the fact that Heubach & Co. sign as "agents for owner," and the sale is expressly made subject to the owner's approval.

The second objection taken was, that the contract upon which the action was brought was merely a contract for a contract, and therefore not actionable. Counsel for the defendants rely upon the provision in the contract making the $1.500 payable "on the execution of the necessary agreement of sale." But all the terms are set forth in the offer of the

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18th January, and the expression of them in a more formal document was not intended as a condition or term of the bargain to be performed before the bargain came into existence. That, I think, is plain. That being so, there is a binding contract, and the reference to a more formal instrument may be ignored: Von Halzfeldt-Wildenburg v. Alexander, [1912] 1 Ch. 289.

It was urged, in the next place, that the offer was not accurately quoted to Paterson; but this objection must be overruled, for reasons I have already pointed out.

It was further urged that the acceptance by Paterson was an acceptance conditional only upon the trustees' approval. But it is admitted in the pleadings and in the evidence that Paterson was the beneficial owner, and that the trustees were in fact and substance merely mortgagees, who could be called upon to implement the contract made by the beneficial owner. So that there is nothing here on which to base a difference of opinion from that of the trial Judge.

Objection was also taken to the description of the lands as being inadequate. But the decisions on this branch of the Statute of Frauds have been of the most liberal character. I think the evidence before us, and that tendered to amplify it, sufficient. In fact, this objection, as I understand it, was not seriously insisted upon.

In my opinion, the judgment appealed from should be affirmed.

HOWELL, C.J.M., and RICHARDS, J.A., concurred.

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## MANITOBA.

PRENDERGAST, J. APRIL 8TH, 1912.

TRIAL.

# McCUTCHEON LUMBER CO. v. MUNICIPALITY OF MINITONAS.

*Assessment and Taxes — Distress for Taxes on Personal Property—Municipal Assessment Act, sec. 129—Action for Illegal Distress—Onus — Municipal Corporation — Hypothecation of Taxes to Bank—Right to Distrain—Irregularities in Assessment—Curative Statute—Retrospective Construction—Pleading—Public Act — Statutory Provisions Regarding Seizure — Substantial Compliance with—Absence of Discrimination.*

Under sec. 129 of the Municipal Assessment Act, distress may be levied for taxes due on personal property.

In an action for illegal distress for taxes, the onus is on the defendants to shew the legality of the seizure.

Although the defendant municipality had hypothecated to a bank all arrears of taxes, as security for repayment of money borrowed, the municipality had property in the taxes sufficient to enable them to distrain.

Objections that the statutory requirements were not complied with in the matter of assessments, revision, levying of taxes, etc., were answered by the provisions of a special Act respecting the defendant municipality, 10 Edw. VII. ch. 38, which, being declaratory, was to be construed retrospectively, and, being a public Act, was to be regarded, though not pleaded.

The provisions of sec. 129 having been substantially complied with in respect of the seizure, and no unfairness or discrimination being shewn, the action failed on all grounds.

Action for an injunction and damages in respect of a distress for taxes, alleged to be illegal.

J. B. Coyne and A. C. Campbell, for the plaintiffs.

C. P. Wilson, K.C., and W. C. Hamilton, for the defendants.

PRENDERGAST, J.:—This action arose out of a distress of the plaintiffs' chattels by the Municipality of Minitonas for alleged arrears of taxes; in the course of the distress proceedings the plaintiffs obtained an interim injunction restraining the defendants from selling.

The plaintiffs allege that the seizure was illegal and wrongful, chiefly because the statutory provisions in regard to assessment and the requirements in distress proceedings

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generally were not complied with, and they pray for a declaration that there were no taxes in arrears for which distress could be made, for an injunction, and for damages and costs.

The defence of the municipality is to the effect that, at the time of seizure, there were taxes due by the plaintiffs for the years 1905, 1906, 1907, and 1908, and that the provisions of the Assessment Act were observed in assessing and levying the said taxes as well as in making the said distress.

The defence of Campbell, who is alleged to have taken part in the distress proceedings, is, that he so acted as agent for the municipality, and is not a proper party to the action.

The question of onus having arisen at the opening of the trial, I decided that it rested on the defendants. The only evidence tendered by the defendants was that of the secretary-treasurer of the municipality. The plaintiffs produced no witness.

I will first deal with that of the plaintiffs' objections which is of widest scope, and that is, that distress cannot be levied for taxes due on personal property. Of course, as remarked by Strong, J., in O'Brien v. Cogswell (1870), 17 S. C. R. at p. 424, it is well settled that enactments imposing and regulating the enforcement of taxes for general and municipal purposes should be construed strictly, and that in all cases of ambiguity that construction should be adopted which is most favourable to the subject. But I see no ambiguity in sec. 129 of the Municipal Assessment Act, which provides for this matter. The plaintiffs' counsel would have the word "taxes" in the first line of the section read as "real property taxes;" but there is no ground to warrant this construction—the less so as the word "taxes," as used throughout the Act, is made clearly to apply to rates on both real and personal property. To adopt the view urged would lead to this strange, if not anomalous, distinction, that goods could be sold for taxes due on real property, but not for taxes due on the goods themselves, and there would be, moreover, no method in the latter case whereby payment could be enforced except by action. I am of opinion that, in the words of the section, distress is in order "in case a person neglects to pay his taxes" and not only in case a person neglects to pay his real property taxes.

It is also contended for the plaintiffs that the municipality had no property in the taxes in question by reason of by-

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laws 90 and 93, and that they consequently had no right to distrain for the same. These by-laws were passed for the purpose of enabling the municipality to borrow money on their promissory note from the Bank of Toronto, and contain provisions, the effect of which, in my opinion, is, simply, that all arrears of taxes are made security for repayment. The by-laws use the word "hypothecate," which suggests a lien only, and not a transfer or assignment, under which all proprietary interest would pass at once from the municipality to the bank. In fact, a straight and complete assignment would have defeated its object at least in part, as the municipality could not then, as urged by the plaintiffs themselves, have been able to levy the taxes compulsorily.

There are also a great many objections to the effect that the statutory requirements were not complied with in the matter of assessments, revision, levying of taxes, etc. Some of the irregularities shewn are of the gravest nature indeed.

I believe, however, that these are sufficiently answered by 10 Edw. VII. ch. 38, being an Act respecting the Municipality of Minitonas, by sec. 1 of which, notwithstanding any defect or irregularity, the assessments, by-laws, levies, and taxes of the municipality for the years 1901 to 1909 are declared to have been and to be sufficient, valid, effectual, and binding, as if all proceedings had been fully and completely carried out according to all the provisions of the Municipal Act and the Assessment Act. The section also sets forth that "the validity and legality of the said assessments and by-laws, levies and taxes, shall not be questioned in any action, suit, or proceeding in any Court, on account of any defect," etc. The object of the Act is declaratory as to the taxes for the years named, and, being declaratory, the rule is, that it should be construed retrospectively: Maxwell on Statutes, p. 333; Attorney-General v. Hertford, 3 Ex. 670. As to this statute not being pleaded in defence, it is a public Act.

The grave nature of the irregularities and the extent to which the statutory provisions were disregarded, were strongly urged. In fact, I am free to say that the municipality were in that position where they could probably not enforce payment of any portion of the taxes for some of the years mentioned. But I think that it may fairly be assumed that it was just such an unfortunate state of affairs that moved the legislature, in order that the more astute or unwilling rate-

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payers who had the benefit of municipal expenditures as well as the others, should not escape their fair share of taxation.

With respect to the objections to the seizure, I think it was sufficient to follow the requirements of sec. 129, and that was substantially complied with. This section seems to contemplate that the necessity for any demand is met by mailing the statement and demand mentioned in sec. 123. That the notice was addressed to "The McCutcheon Lumber Co.," omitting to add the word "Limited," is a very technical objection. It is enough to say, I think, that the notice conforms in this respect with the rolls; that the plaintiffs knew that they were the company meant to be designated by that name, and that they acted on that assumption. As to the requirements with respect to posting up under sec. 131, the municipality were still in time, when the interim injunction issued, to supplement any omission in this respect.

I should add that the plaintiffs have not even attempted to shew any unfairness or discrimination against them, either in valuation or otherwise.

The action will be dismissed and the injunction dissolved, with costs to the defendants.

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## MANITOBA.

APRIL 8TH, 1912.

COURT OF APPEAL.

## McNERNEY v. FORRESTER.

*Negligence—Collapse of Building—Injury to Neighbouring Premises—Liability—Evidence — Onus — Good Faith —Acting on Advice of Experts—Necessary Precautions —Duty to Others—Delegation.*

Where a man owes a duty to another, he cannot delegate that duty and evade the responsibility of seeing that the duty is adequately performed. If the duty has not been performed, it is no excuse for the person who should have performed it to shew that he had placed the matter in the hands of another upon whose skill he relied.

Review of the authorities.

And *held* (reversing the judgment of METCALFE, J., 19 W. L. R. 32, upon the facts there set forth), that the defendants were liable for the injury to the plaintiffs' building by the fall of the walls of their own building, partly destroyed by fire, they not having taken proper precautions to prevent the falling.

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Appeal by the plaintiffs from the judgment of METCALFE, J., 19 W. L. R. 32.

The appeal was heard by HOWELL, C.J.M., RICHARDS and PERDUE, JJ.A.

H. Phillipps and W. K. Chandler, for the plaintiffs.

J. E. O'Connor and A. K. Dysart, for the defendants.

HOWELL, C.J.M.:—In December, 1909, a fire destroyed in part a six-storey brick building owned by one Stirling. The building was 50 feet by 120 feet deep, running from Fort street to a lane 20 feet wide. The plaintiffs occupied then, and until the walls fell, the land adjoining the south wall.

Mr. Smith was the architect who acted for Stirling in the construction of the building, and after the fire he was a witness on Stirling's behalf in an arbitration between him and the insurance company.

Shortly after the fire, one Rodgers, the city building inspector, whose duties are apparently to order down or remove walls that are dangerous, and who has had in this work fifteen years' experience, examined the walls, and tells in the evidence the general state of the building. The roof was nearly all burnt off, and had fallen in. A small portion of it, however, apparently in front, had fallen part way down and was resting on some posts and beams. All the sixth floor, but a few feet in front, had fallen. All the fifth floor, except a few feet of charred flooring and joists in the rear and about 15 to 20 feet in front, had also fallen. The fourth floor had been burnt away in the middle—the extent of which is not shewn clearly in the evidence—it had probably fallen in to the extent of one half or one-third. The remaining floors were not injured by the fire.

Throughout the length of the building there extended two rows of wooden posts, supporting two lines of wooden beams, thus dividing it lengthwise in about three equal divisions. Joists at right angles to these beams rested upon the latter, and the ends of these joists were anchored to the walls by iron fastenings; but the manner by which these were fastened together does not appear.

Although the joists and parts of floors which fell must have burnt through, yet these posts and beams were chiefly left standing, as shewn by photographs put in at the trial,

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except some of those in the sixth floor; and these photographs of the ruin, taken before any removal works had been done, shew that the weather at the time of the fire was very severe, as great masses of ice were hanging from the portion of the roof which had not wholly fallen, and the beams and walls were covered largely with ice, frozen evidently as the water fell upon it while the fire was being extinguished.

When the joists burned through, some of them merely dropped down on an incline, with one end fastened in the wall and the other resting on the burnt débris and charred beams or on a floor below. The half-burnt roof and floors fell below, and, no doubt, rested partly on the half-burnt contents of the building and on the posts and beams—making, as shewn by the photographs, a tangled ruin— and upon all this water was thrown, the fire extinguished, and all was frozen in a solid mass.

The evidence shews that the débris was frozen solid up into the fifth storey, and apparently one or more posts in the sixth storey supported a fragment of the roof which seems covered with ice. Mr. Rodgers, after the fire, thought the walls dangerous, and notified Stirling that he must brace the walls, and he ordered the putting in of nine transverse timbers, each reaching across the building, five at about the top of the sixth storey, just under the roof, and four just below the floor of the sixth storey, or at the top of the fifth. The lower four timbers were supported and steadied by the posts and beams left standing at the top of the fifth storey. The five upper ones, each 50 feet long, were not in any way supported or steadied, except at the ends by the north and south wall, and manifestly, as shewn by a photograph, they had sagged, as one would have expected. The south wall had buckled or "bulged" southward to a noticeable extent; and I gather from Rodgers's evidence that these timbers were put in—fastened as they were by iron bolts through the walls to planks—for the particular purposes of holding the walls together.

Rodgers, who was called by the defendants, gave evidence on this subject, and it is so important that I shall quote a portion of the vast volume of it:—

"Q. After the fire was extinguished, what did you do with reference to the building? A. As soon as I could make an inspection of the walls, and satisfy myself as to

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their condition, I decided that they were dangerous, should a high wind occur, and I advised Mr. Stirling on the 11th that he must take steps to protect the walls.

* * * * * * *

"Mr. Phillipps: What kind of an examination did you make? A. I viewed the walls from the inside and outside, and I could see that some bracing of the walls was necessary, as a high wind might do damage to surrounding property. . . . The top of the wall was standing exposed from both sides, and nothing to tie it in at all.

* * * * * * *

"His Lordship: You say that constituted the danger? A. The wind would have a full sweep at them, nothing to steady them at all.

"Mr. Phillipps: Nothing to steady them? A. No.

"Q. When you say the wind would have a full sweep at them—supposing there were no braces in there at all, did you think any wind that might be expected to come along would do damage to them? A. Was liable to.

"Q. Was liable to? A. Yes, certainly.

"Q. And that is something—or don't you think any ordinary wind would have been liable to result in damage? A. Yes. The idea of putting in the braces was to draw them in to the portions that were standing up against the wall, the fallen joists.

* * * * * * *

"Mr. Phillipps: You spoke of a solid mass? A. Yes.

"Q. You know the solid mass you are referring to, do you? A. Yes.

"Q. You have it now immediately present in your mind? A. Yes.

"Q. How long would that have continued to have supported, or how long would that have continued to have afforded the protection to the building, after the fire? A. As long as it remained frozen.

"Q. There is no doubt about that in your mind now? A. No.

"Q. That is all clear? A. Yes.

"Q. And it would have remained frozen longer than the outside walls? A. Yes.

"Q. Because the sun would not have come in? A. Any portion of it where the sun could come in at the back, and

get to it, it would thaw faster in there than it would on the outside wall.

"His Lordship: By 'the solid mass' you mean what? A. I mean furniture, beams, joists, charred cinders, that had been left there, or débris is what I call it, and what portion of burned woodwork that they could shovel out of the building.

"Q. By the solid mass you evidently mean floors, and everything in the building? A. Yes, everything in there. The water poured in there on it, and it was frozen almost before it would strike it, and the spray, from where the stream would strike, rolling off and freezing, and making just one solid mass of the whole thing.

"Q. And there is no doubt that that would afford less support when it became thawed than it afforded when frozen? A. Yes, to a degree; the joists burned off at the centre of the beams, the fire being at the centre of the building, when they would burn off they would drop down and form a brace against the outer walls, of course, as I have explained."

On the 10th March, the defendants became the owners of this property, having previously for some time been fully aware of its state and condition. They at once employed Mr. Smith as their architect, and authorised him to commence the work of rebuilding; and the defendants, with Smith, employed one Finkelstein to remove the half-burnt rubbish and half-burnt furniture, the contents of the building, together with ice and snow. The latter, with a gang of men, after about two weeks' work, on the 22nd March had most of this removed, and on that day his workmen became greatly alarmed by some falling bricks and swaying of the walls, and ran from the building. The defendant Forrester was sent for; and he, on the evening of that day, sent for both Rodgers and Smith. The next day both these men apparently examined the building. Rodgers swears he thought the walls then were still strong enough, although he knew the weather was then much warmer, and the débris was removed. To me, on this subject, his evidence is not satisfactory. Smith, the adviser of Forrester in all these matters, although present at the trial, was, for some reason, not called. He of all others knew of the state of the walls, for he directed Finkelstein from time to time as to the material which should be removed, and he gave evidence before the

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arbitrators as to the loss by the fire. Forrester swears that both Rodgers and Smith told him on that day that the walls were strong enough as they were then braced, although the ice and débris had been removed. The next day the walls fell, and the plaintiffs' building adjoining the south wall was crushed—the subject-matter of this suit.

At the time of the falling of the walls, the wind was blowing at the rate of 36 miles per hour from the north-west, and Rodgers swears that this wind caused the walls to fall.

It was shewn by the evidence that on the 6th March, while the interior frozen mass was firm, a wind of 56 miles per hour from the same direction was blowing and the walls remained firm; and it was also shewn by the evidence that for a few days before the accident the weather had turned warm; but from my own experience for 33 years I think this should not be unexpected.

It appears then that the original braces directed by Rodgers were considered sufficient, with the assistance of the frozen interior mass; that on the 6th March this was sufficient against a very high wind; that shortly thereafter the frozen interior mass was removed by the defendants; and that on the 24th March, with a wind much less forcefull, the walls fell.

The learned trial Judge, in his reasons for judgment, says: "I think Mr. Rodgers and Mr. Smith were mistaken when shortly before the accident they told Mr. Forrester that the walls were safe. I think that, considering the temperature and the removal of the débris, some further precautions should have been taken so as to counteract the effect of the removal of the ice and débris." The learned Judge, however, found a verdict for the defendants.

It seems to me that the irresistible conclusion to be drawn is, that the walls were greatly weakened by the débris having been removed, and that some one was negligent. Rodgers never spoke to the defendants respecting these walls until the 22nd or 23rd March, after the débris was removed. Forrester has sworn to what Mr. Smith said, but the latter has not pledged his oath as to his opinion, or what he advised, and we do not know what his real views were.



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The walls upon the defendants' property were dangerous and a menace, and were a nuisance to the adjoining property-holders; and, although the work of restoration was in itself lawful, injury to the adjoining property might be expected unless certain precautions were taken. But the defendants contend that, having acted upon the advice of Rodgers and Smith, they are not liable. It will be at once apparent that they did not act upon the opinion of Rodgers, for they did not consult the latter until after the ice and débris had been removed; and, as the walls fell early the next morning after the defendant Forrester spoke to Rodgers, he would have had little time to act if action had been directed. The only advice he took was that of Smith, a person employed by him; and, as we do not know what this architect's real views or intentions were, I should presume strongly against the defendants because of their not calling him as a witness, and I think I am supported in this position by Baker v. Furlong, [1891] 2 Ch. at p. 184.

It seems to me that the sole question of law is, can the defendants shield themselves behind the advice given them, as Forrester swears, by the architect Smith?

The case of Jolliffe v. Woodhouse, 10 Times L. R. 553, was an action between adjoining owners, and in it Lord Justice Lindley held that the duty owed to an adjoining owner could not be delegated to a builder or architect, so as to free the defendant from liability. Sir Louis Davies, in Valiquette v. Fraser, 39 S. C. R. 1, at p. 4, held that the opinion or advice of an architect was no more protection than the protection of an independent contractor. In 3 Halsbury's Laws of England, p. 315, after discussing the duties of an employer where, if care is not taken, mischief will follow, the author says: "And he cannot divest himself of this duty by employing some other persons (whether contractor, architect, or engineer) to do what is necessary to prevent mischief, or by stipulating that such other person shall take precautions against it."

The law on the subject-matter of this suit in the State of Massachusetts is fully set forth in Ainsworth v. Lakin, 55 L. R. A. 132, and the authorities are all considered. It is there held that where walls are dangerous after a fire, the owner cannot, as against an adjoining owner, shield himself behind an independent contractor, and that he cannot avoid liability by delegating that duty to another.

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The duty which an owner owes to the adjoining occupant is also set forth in Hughes v. Percival, 8 App. Cas. 443; and, at p. 445, Lord Fitzgerald says: "He cannot get rid of the responsibility thus cast on him, by transferring that duty to another."

I cannot understand why the negligence of an architect or an engineer would shield the defendant, when he cannot get that protection from the most skilful builder or contractor.

The walls fell because of the negligence of the defendants, or some one employed by them; and, in my view of the law, they are liable.

Common experience here tells us that such a wind as that which was blowing on the morning of the accident cannot be unexpected, and I can see no reason to call that, or the temperature then prevailing, vis major against which the defendants were not bound to provide.

The judgment will be set aside and the case disposed of as set out in detail in the judgment of Mr. Justice Perdue.

RICHARDS, J.A.:—The defendants became the owners of a six-storey brick building, the side walls of which were 120 feet long. Prior to their ownership a fire had, during severe winter weather, destroyed the three upper floors. This fire burned away practically all of the flooring of the two top storeys, and the greater part of that between the third and fourth storeys. There remained, however, in the three upper storeys many pieces of charred joists and other partly burned material. Much water was thrown on these upper storeys during the fire, which water froze there, owing to the severity of the weather. The ice thus formed, together with the charred pieces of joists and other materials embedded in it, made a bracing that helped to keep the walls in place. As soon as possible after the fire, the then owner caused braces to be put in, which, with the bracing formed by the ice and other materials already there, was apparently sufficient to keep the walls from falling.

After the defendants bought the property, the defendant Forrester, who acted for himself and his co defendant, and whom I shall therefore for brevity refer to as "the defendant," through their architect, employed a contractor to remove the frozen débris, but did not employ him or any one to put in further braces, to take the place of the support

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thus removed. The contractor did clear out the upper three storeys, leaving them with only the braces which had been put in by the first owner after the fire. The result was, that the bracing left was insufficient. While in that condition, a wind, not greater than might be expected at that time of year, arose and blew down large parts of the side walls. One of those walls fell on and injured the plaintiffs' property next adjoining.

The trial Judge found that the bracing at the time of the fall was insufficient; and in this, I think, he was justified by the evidence. He, however, found that the defendant had relied upon the architect and the city building inspector as to the sufficiency of the bracing that had been put in after the fire, to maintain the walls in safety, after the contractor had done his work; and held that, because of his so relying, he and his co-defendant were not liable for the damage resulting from the fall.

I do not see that the evidence, when analysed, shews clearly that the inspector did give the advice on which the defendant says he relied. If given, it was not till after the rubbish had been removed and the bracing thereby weakened. The fact that the architect, though in Court, was not called as a witness, casts a good deal of doubt on the statement that he advised the defendant that the course he took was a safe one. But, assuming, for the moment, that they, or either of them, did so advise, I am, with deference, unable to agree with the learned trial Judge as to his conclusion of law. There are decisions to be found of Courts in some of the United States in which the view taken by him has been upheld, but I do not think that it is the law of England or of this province.

It has been suggested that the rule of law on which Rylands v. Fletcher, L. R. 3 H. L. 330, was decided, applies to this case. It seems to me that, if I had to consider that point, I should hold that it does not. But, in the view I take of the facts, it is not necessary to decide that question here. The rule which does apply is, in my opinion, well stated in a decision of the Supreme Judicial Court of Massachusetts, Ainsworth v. Laken, reported in 57 L. R. A. 132. I quote from p. 135 (2nd column): "It was the duty of the defendant not to suffer such a wall to remain on his land, where its fall would injure his neighbour, without using such care in the maintenance of it as would absolutely

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prevent injuries, except from causes over which he would have no control, such as vis major, acts of public enemies, or wrongful acts of third persons, which human foresight could not reasonably be expected to anticipate and prevent."

In the present case it was apparent, I think, after the débris had been taken out, that the walls were not safely braced. If the defendant had employed the contractor, when taking out the frozen rubbish, and thereby weakening the bracing of the wall, to sufficiently replace such support with further bracing, and the contractor, though a competent one, had neglected to do so, and the injury which did happen had resulted therefrom, there is no doubt that the defendants would be liable. Their liability is the more apparent when he did not even arrange for anything to take the place of the support so removed. On what principle an owner of dangerous property, who could not protect himself from an action for damages because he had employed a capable contractor, should be protected because, instead of relying on a contractor, he relied on an architect or city inspector, I am unable to see. The principle seems to me the same in either case.

In Jolliffe v. Woodhouse, 10 Times L. R. 553, the Court of Appeal for England held that, where the defendant owed the plaintiff a duty to do certain rebuilding with reasonable despatch, it was no answer to an action for breach of this duty to prove that he had delegated the carrying out of it to an architect and builder.

In Halsbury's Laws of England, vol. 3, paragraph 670, it is said: "Where the nature of the contractor's employment is such that, though the work is in itself lawful, injury to the property of the neighbouring owner may be expected to arise in the natural course of events, unless certain precautions are taken, then it is the duty of the employer to take care that those things are done which are necessary to prevent the mischief arising; and he cannot divest himself of this duty by employing some other person (whether contractor, architect, or engineer) to do what is necessary to prevent the mischief, or by stipulating that such person shall take precautions against it."

I cannot see that the advice of a city building inspector can be placed on any higher plane than that of an architect.

I think the plaintiffs are entitled to recover under the circumstances of this case.



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As the learned trial Judge took no evidence of quantum of damages, and as the parties have agreed to that question being referred to the Master if we hold the defendants liable, there will be such a reference.

Costs and further directions to be reserved. The plaintiffs to have the costs of the appeal in any event of the cause.

PERDUE, J.A.:—The plaintiffs were tenants of premises on the north-east corner of Fort and Graham streets in the city of Winnipeg, in which they carried on their business of blacksmiths. The Stirling block, a large brick warehouse, adjoined their premises immediately on the north. This block was six storeys in height, and the side contiguous to the plaintiffs' premises was 120 feet in length. On the 9th December, 1909, a fire took place in the block, which greatly injured the upper portion of it, the interior of the fifth and sixth storeys, together with the roof, being almost completely destroyed. The third floor, counting the ground floor as the first, appears to have remained intact, but there was a large hole burnt in the fourth floor, through which the wreckage of the storeys above fell, and formed, with the water thrown upon it, a frozen mass extending almost to the sixth floor. The south wall, which adjoined the plaintiffs' premises, bulged outwards at the top.

The upper portions of the end walls were also injured and weakened by the effect of the fire and of the water thrown upon them.

Immediately after the fire, Mr. Rodgers, the city building inspector, informed Mr. Stirling, the owner, of the dangerous condition of the walls. Accordingly, Mr. Stirling, under Mr. Rodgers's direction and with his approval, had braces put in, extending across the building from the north to the south wall. Four of these braces were placed near where the sixth floor had been, and the remaining five were put in the sixth storey, near the top of the walls. The object of putting in these braces was to secure the walls from falling until repairs or reconstruction could take place.

On the 6th March, 1910, the defendants purchased the land and the injured building as it stood, taking possession of it on the 10th March. On the 24th March, the accident occurred which caused the injuries of which the plaintiffs complain. A considerable portion of the side walls of the

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building, from the fourth floor upwards, fell, the south wall falling outwards upon the plaintiffs' premises and doing serious damage.

There can be no doubt that, after the fire, the building was in a condition which endangered the plaintiffs' premises. The then owner, Stirling, instead of taking down the walls to a point where they would cease to be dangerous, endeavoured to keep them in position by bracing them, as above mentioned. After the building had remained in this condition for some three months, the defendants purchased it. Before buying it, they made a personal examination of it and also had it examined by their architect, Mr. Smith. They, therefore, must be taken to have purchased the building with notice of its condition; and, if the walls were in danger of falling, it became the defendants' duty as owners to protect the adjoining premises from injury: Attorney-General v. Heatley, [1897] 1 Ch. 560.

The defendants place much reliance upon the approval by Rogers and Smith of the manner in which the walls were braced, and upon the opinion of these gentlemen that sufficient precautions had been taken to prevent an accident. We have not the benefit of Mr. Smith's evidence as to what his opinion was. The defendants did not call him as a witness, although it was alleged by counsel and not denied that he was present during the trial. Evidence of what he stated to the defendant Forrester was not admissible to prove the opinion of Smith as an expert. The building inspector, Rogers, is not an architect, but he has had some experience as a builder, and much experience in judging of the strength of walls and the condition of buildings which have been injured by fire. He states that he made an inspection of the walls after the fire and considered them dangerous. He advised Stirling that the latter should take steps to protect the walls. In accordance with this advice, and with Rodgers's approval, the braces were put in. Rodgers expected that reconstruction work would soon be commenced, and he did not anticipate that there would be such a long delay in making the repairs. It is clear that he approved of the system of bracing that was adopted, only as a temporary expedient to keep the walls in position until the building could be repaired.

Considerable evidence of experts was put in by the plaintiffs to shew that the braces were insufficient for the pur-

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pose for which they were intended. It is not necessary to discuss this evidence in detail. One fact of great importance was admitted by all the witnesses, including Rodgers. The pile of débris in the centre of the building, consisting of charred timbers, furniture, and other material, had been frozen into a solid mass by reason of the great quantity of water thrown into the building. Joists which had been burnt through in the interior part of the structure dropped down at one end, the other end remained anchored or attached to the wall. The burnt ends of the joists became frozen in the interior mass and formed braces which helped to retain the walls in place. This frozen mass attached to the walls operated, in the opinion of all the witnesses who gave expert testimony, as a great source of strength to the structure. Rodgers states that it would have a stiffening effect on the walls, that it "would clamp the walls together," that it "brought the whole thing together tight." He also stated that he took that element of strength into consideration when he considered the braces.

It is, therefore, evident that, if the interior mass of frozen material were removed, the structure would be deprived of a factor which largely contributed to its safety.

The defendants obtained possession of the building on the 9th March, 1910; and, shortly afterwards, they let a contract, through their architect Smith, for the cleaning out of the building. The work of cleaning out proceeded under this contract, and the interior mass of débris was removed. Some unburnt portions of the floor were left, and also the unburnt posts and the beams that extended lengthwise through the building and supported the ends of the joists. There appear to have been no beams running across the building; and where the joists were burnt there was nothing except the braces at the top to hold in the side walls. The trial Judge seems to have been under the impression that there were "bond timbers" which helped to support the walls, but these bond timbers, as explained in the evidence, were simply pieces of timber built lengthwise into the walls between the courses of brick, upon which the ends of the joists rested. They were a part of the wall itself and did not act as braces.

The effect of the removal of the interior mass was made evident shortly before the accident occurred. During a moderately windy day the walls commenced to shake, a

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brick fell from a chimney, and the men working in the building became alarmed and ran out. On the following day, the 23rd, Smith, the architect, and Rodgers examined the building, and thought the walls were safe. On the next day, the 24th, during a moderately high wind, the walls fell. The accident occurred after a day of very high temperature for that time of the year, the maximum on the 23rd being 73 degrees and the minimum 44 degrees. The effect of the high temperature would be to thaw the ice from the walls and to remove any strength they might take from their frozen condition. As shewing that the removal of the frozen mass from the interior of the building weakened the wall and contributed to the accident, evidence was given that on the 6th March, before any of the contents had been removed, the walls withstood a wind as high as 56 miles an hour from the north-west, while the wind on the day of the accident was only 36 miles an hour from the same direction.

I think the proper conclusion to be drawn from the evidence, as to the sufficiency of the bracing, is, that the braces might be expected to maintain the walls in position as long as the interior mass remained undisturbed and in its frozen condition, but that, as soon as any considerable portion of it was removed, something should have been supplied to take its place. Even if no part of the interior mass were removed, it was admitted by Rogers that there would be danger as soon as the temperature rose so as to cause a thaw.

Where the owner of land permits the walls or chimneys of the buildings erected upon it to get into a ruinous and dangerous condition, and knowingly permits them so to remain until they fall upon and injure the house of an adjoining proprietor, he is liable for the damage caused: Todd v. Flight, 9 C. B. N. S. 377. There is the same liability under the laws of the province of Quebec: Nordheimer v. Alexander, 19 S. C. R. 248. The duty of an owner is to keep his building in such a state that his neighbour may not be injured by its fall: Chaunter v. Robinson, 4 Ex. 163. The liability in such a case is clearly established if the owner knows his building is dangerous and fails to take steps to prevent it from falling; but difficulty arises in considering what degree of care, if any, will protect him in case an accident occurs and damage is caused to his neighbour.

The principle has been established by the case of Rylands v. Fletcher, L. R. 3 H. L. 330, that a person who for

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his own purposes brings on his land, and collects and keeps there, anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, he is prima facie answerable for all the damage naturally resulting. In such case he can only excuse himself by shewing that the escape was owing to the plaintiff's default, or perhaps that the escape was the consequence of vis major: per Blackburn, J., in the Exchequer Chamber, L. R. 1 Ex. p. 279, and approved in the House of Lords. The position of the defendants in the present case differs from that dealt with in Rylands v. Fletcher in this respect, that they had been putting the land to its natural use, and the erections only became dangerous by the happening of the fire. But, after the walls became dangerous, and were known to be so, by the owner of them, the liability in each case must, where injury takes place, be very similar.

An injured wall which may from want of cohesion fall over at any time on the adjoining land may reasonably be regarded as a thing having a tendency to escape, within the rule laid down in Rylands v. Fletcher: see Clerke and Lindsell on Torts, Can. ed., p. 439. There can be very little difference in the responsibility which a man incurs by keeping a reservoir filled with water threatening his neighbour's land and the responsibility he incurs where he keeps a ruinous wall overhanging his neighbour's property. If he cannot escape liability in the first case by shewing that he acted upon the best advice and took all reasonable care and precaution, can he in the second case evade responsibility by establishing a similar defence?

A person who keeps a lamp overhanging a public street is bound to maintain it in a safe state of repair, and this is a liability which he cannot get rid of by shewing that he employed a competent person to put it in repair: Tarry v. Ashton, 1 Q. B. D. 314. The same responsibility would be incurred where the structure, without permission or right, overhung or threatened private land, in respect of an injury caused to the owner of the latter or to his property.

I think the present was a case where the owner of the damaged walls was bound to exercise the utmost diligence in protecting the plaintiffs from injury. Stirling, in the first place, and the defendants afterwards, knew of the condition of the walls. The south wall after the fire was in a very dangerous state, and threatened the plaintiffs' premises. It

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was the duty of the owner of the wall to make it safe or to pull it down. If he allowed it to remain, he was responsible for its safety.

The defendants urge that the walls had been sufficiently braced by Stirling's direction, and that they were entitled to rely upon the opinion of Rodgers, the building inspector, and Smith, the architect, that this had been sufficiently done, and that the walls were safe. They, as purchasers from Stirling, are in the same position as he in regard to their duties and responsibilities to the plaintiffs. It was Stirling's duty to make the walls safe, and that duty he could not delegate to Rogers or Smith or any other person so as to avoid responsibility himself: Hughes v. Percival, 8 App. Cas. 443; Bower v. Peate, 1 Q. B. D. 321, approved in Dalton v. Angus, 6 App. Cas. 740. The means taken or advised by Rodgers and Smith were insufficient, and there is no question of vis major in this case.

Apart from the proposition whether the defendants would discharge their duty by acting upon the advice of a competent architect, there is another phase of the case which bears strongly on the defendants' liability. The evidence shews that the system of bracing adopted was intended to be of a temporary character only. When giving his approval of what was done to hold the walls in place, Rodgers relied upon the strength given to the structure by the interior frozen mass. Evidently, it was not intended that the bracing would be sufficient without the frozen débris as an internal support, unless something were done to take its place upon its removal. It is clear that the precautions which proved to be sufficient, as long as the building remained in the same condition in which it was when the braces were first put in, completely failed when the contents of the building were removed and the ice thawed from the walls. If, therefore, it were admitted that Stirling had exercised due care and diligence in the precautions he took, the defendants, by removing the contents of the building and depriving the walls of an important factor contributing to their support, while nothing was done to take its place, not only failed to exercise reasonable care, but were guilty of an act of positive negligence.

The learned trial Judge found that the accident occurred by reason of the insufficiency of the bracing. He was also of opinion that some further precaution should have been

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taken to counteract the effect of the removal of the ice and débris. This is, in effect, a finding that due care was not taken to avert the fall of the walls and the resulting damage to the plaintiffs. The trial Judge, however, took the view that the owners, having in good faith acted upon the advice and assurance of the architect and the building inspector and having done what they advised, had satisfied the duty owed to the plaintiffs. I think it may be regarded as settled law that, where a man owes a duty to another, he cannot delegate that duty and evade the responsibility of seeing that the duty is adequately performed. If the duty has not been performed, it is no excuse for the person who should have performed it to shew that he had placed the matter in the hands of another upon whose skill he relied: Jolliffe v. Woodhouse, 10 Times L. R. 553; Bower v. Peate, supra; Hughes v. Percival, supra; Valiquette v. Fraser, 39 S. C. R. 1, 4; Ainsworth v. Lakin, 57 L. R. A. 132.

I think the appeal should be allowed with costs, the judgment in favour of the defendants set aside, and judgment entered for the plaintiffs with costs on the King's Bench scale. As it was agreed between the parties that, if damages were awarded, the amount thereof should be found by the Master, there should be a reference for that purpose; further directions and the question of the costs of the reference will be reserved to be dealt with by a Judge of the Court of King's Bench.

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THE

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## MANITOBA.

APRIL 8TH, 1912.

COURT OF APPEAL.

## NIXON v. DOWDLE.

*Principal and Agent—Agent's Commission on Sale of Land —Option—Agreement — Onus — Evidence — Appeal— Reversal of Finding of Trial Judge.*

The judgment of the trial Judge, MACDONALD, J., 19 W. L. R. 775, was reversed on appeal, upon a consideration of the oral and documentary evidence, and the plaintiffs' action for a commission on the sale of land was dismissed, upon the ground that he had failed to prove an agreement.

The trial Judge overlooked the effect of N. (the plaintiff who actively negotiated the transaction) taking from the defendant an option of purchase in his own name. Even if the trial Judge's finding that the defendant had agreed at first to pay N. a commission, if he made a sale, be adopted, the taking of the option in N.'s name imposed on the plaintiffs the onus of proving that, although N. appeared as purchaser, the defendant had again agreed that N. should receive a commission; and that onus had not been discharged.

Appeal by the defendant from the judgment of MACDONALD, J., 19 W. L. R. 775.

The appeal was heard by HOWELL, C.J.M., RICHARDS, PERDUE, and CAMERON, JJ.A.

A. C. Galt, K.C., and C. S. Tupper, for the defendant.

A. B. Hudson and J. E. Adamson, for the plaintiffs.

RICHARDS, J.A.:—The plaintiffs are partners doing business as real estate agents in Winnipeg. As the plaintiff Gough took no part in the transactions in question, I shall mean the plaintiff Nixon when referring to "the plaintiff."



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The plaintiff learned that the defendant, who lived at Swift Current in Saskatchewan, had a section of land near that town, which he was subdividing so as to sell it in town lots. The plaintiff and the defendant met at Swift Current and discussed the question of the plaintiff selling the land for the defendant according to the subdivision. The plaintiff decided that he would not undertake selling it in this way.

Afterwards, the plaintiff agreed to try to sell the land for the defendant at $55 an acre. He asserts that at one or both of these interviews he was promised a commission of 5 per cent. if he made a sale.

The plaintiff interested Mr. Prout, of Winnipeg, in the property, and Mr. Prout, who was able to buy at $55, became ready and willing to do so, and went to Swift Current for that purpose, but discovered, when there, that the defendant had raised his price to $250 an acre; so that nothing came of the negotiations at that time.

Later, the plaintiff went to Swift Current, and he and Mr. Macdonald, a bank manager, remonstrated with the defendant as to the price he was asking, and finally persuaded him to sell for $55 an acre.

An option in writing was then drawn by Mr. Macdonald and signed by the defendant, giving the plaintiff the right to purchase at $55 an acre within a limited period. The option, on its face, purported to be given for the consideration of $100, paid at the time of giving it. The plaintiff asserts that the option was made only to enable him to shew Prout that he could now carry out the sale to him. He says that at this interview it was stated to and understood by the defendant that he, the plaintiff, was taking this option merely to enable him to turn it over to Mr. Prout at the same price, $55 an acre, and that it was really a sale from the defendant to Prout. Both the defendant and Mr. Macdonald deny that anything of the kind was said. Mr. Macdonald says that he (Macdonald) knew that it was being taken for Prout, but that nothing was said which would lead the defendant to suppose that. All parties agree that in these last negotiations, which ended in the giving of the option, there was no mention whatever of any commission to be paid to the plaintiff.

After getting the option, the plaintiff communicated with Mr. Prout, who went again to Swift Current. The plaintiff then told the defendant that the sale was to be carried

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purchase, and took a receipt, which says at the end "given in pursuance of option . . . made between J. E. Dowdle and S. O. Nixon." Apparently, the plaintiff knew the wording of that receipt. He sets it out and relies on it in his statement of claim.

A formal agreement was signed later on, carrying out the sale as from the defendant to Prout. While it was being prepared, Prout suggested that there should be a provision put into it, that the defendant was to pay the plaintiff a commission on the sale. The defendant, Prout, and Smyth (in whose office the agreement was prepared) agree that the defendant thereupon positively refused to pay the plaintiff any commission, saying that, so far as he was concerned, the plaintiff had dealt with him as a purchaser, in taking the option.

The defendant and Mr. Smyth both say that, on the above happening, the defendant went out and shortly returned with the plaintiff, the parties then present being the plaintiff, the defendant, and Mr. Smyth. Mr. Prout appears to have left the office before the defendant returned. The defendant and Smyth swear positively that, on the plaintiff and defendant so coming to the office, the question of the plaintiff claiming a commission was discussed, and that the defendant then declared positively that he would not go on with the sale if the plaintiff claimed any commission from him, and that the plaintiff thereupon agreed that, rather than stop the sale, he would abandon all claim to a commission.

The sale ultimately was carried through without any such provision being made in the agreement; and the plaintiff, according to his own evidence, went back to Winnipeg, and thereafter went east. During all this time, he made no claim whatever for a commission. He did not instruct the suit to be brought for it, but discovered, on his return from the east, that his partner, Mr. Gough, had caused the present action, which is for that commission, to be brought.

The action was tried before Mr. Justice Macdonald. He held that the original agreement to pay the commission was binding upon the defendant, and gave judgment in favour of the plaintiffs.

Whether the plaintiff would have been entitled to a commission if he had done nothing further than procure

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Mr. Prout, in the first instance, to buy at $55 an acre, need not now be considered. There is much to be said in favour of the contention that he would. But, with the utmost deference, I think the learned trial Judge has overlooked the effect of the plaintiff taking the option of purchase to himself. Such an action would ordinarily do away with his previous right to a commission, and put him in the position of a purchaser, in which case he would be dealing at arms' length with the defendant, and could not claim that he was his agent and entitled to a commission.

It is true, I think, that, although the plaintiff took the option as he did, he would not be prevented from shewing, if the fact was, that, as a part of the same transaction, it was agreed that it was merely taken for the purpose of enabling him, as the defendant's agent, to carry out the sale to Prout, and that it was specifically agreed that he was to have a commission; but, after taking an option to himself, the onus was very strongly upon the plaintiff to prove that state of affairs.

He admits that he did not make any arrangement for a commission when taking the option or carrying out, in pursuance of that option, the sale to Prout. He asserts that the defendant knew that Prout was really the purchaser intended by the giving of the option; but the evidence of Macdonald, which I do not think the learned Judge has intended to discredit, contradicts this flatly, and corroborates the evidence of the defendant.

Then there is the evidence as to the interviews when the formal agreement with Prout was being drawn. Prout, who was called by the plaintiff, admits that the defendant positively refused to go on with the sale if he was to be liable to pay a commission to the plaintiff. Prout does say that the defendant stated to him that he supposed the plaintiff would have to have a commission; but he admits that, at what was apparently the same interview, the defendant absolutely refused to, himself, pay any commission. The only conclusion I can draw from that is, that the defendant thought that some one else than himself should pay the commission. He may have had Mr. Prout in his mind as the person who should pay it.

Then again there is the interview at which Mr. Smyth and the plaintiff and the defendant are said to have been present, and there again the defendant's story is corrobor-

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ated by Mr. Smyth's evidence. The plaintiff denies that this interview took place, though he admits having been in Mr. Smyth's office a number of times. Carefully reading the plaintiff's evidence, and bearing in mind that the learned trial Judge had the witnesses before him and the advantage of seeing their demeanour, I am, nevertheless, with regret, obliged to differ from him as to his conclusion that this interview did not take place. It seems to me that the evidence very strongly shews that it did.

Then, there is further the fact that the plaintiff went away and made no claim for commission, acting in all respects as a man would who had expected none, and not as one would have expected him to act if he thought himself entitled to it. I quote shortly an answer, towards the end of his evidence, when called in rebuttal. The question and answer are: "Q. You never did claim any commission? A. Emphatically no. I never did. I never claimed any after that. I told Mr. Dowdle I never asked for any commission, and I came into this thing when my partner, Mr. Gough, put this matter in the hands of Mr. Adamson." Mr. Adamson is the solicitor who brought the action.

With the utmost deference to the learned trial Judge, it seems to me that, in deciding this matter, he has overlooked the way in which the onus of proof was affected by the taking of the option to the plaintiff himself.

As the matters in issue are questions of fact, except the point of law as to the effect of the taking of the option on the onus of proof, I have hesitated to disagree with the learned trial Judge, but I can see no other course than to conclude that the plaintiffs have failed to make their case.

I would allow the appeal with costs, set aside the judgment in the Court below, and enter judgment for the defendant there with costs.

PERDUE, J.A.:—This action is brought to recover a commission in respect of a sale of land. Dowdle, the defendant, who resides at Swift Current, Saskatchewan, had purchased a section of land at that place, making a small payment in cash. It was his intention to divide the land and sell the lots. Mr. Macdonald, the manager of the Royal Bank of Canada at Swift Current, was looking after the interests of one of the prior vendors of the land. Macdonald, who was acquainted with the defendant, urged him to resell, there

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being some doubt as to Dowdle's ability to carry through the purchase. Macdonald then introduced Nixon to the defendant as a real estate dealer. Nixon resided in Winnipeg, but had come to Swift Current on business. This was about 1st April, 1911. Some negotiations took place between the parties, the evidence in regard to which is contradictory. I prefer, therefore, to take the evidence of Macdonald, who appears to have been a man of standing in the community and a disinterested witness. He says: "I think they agreed that Nixon was to go and look over the property, and the next day or immediately after that they did go and look at the property, and Mr. Nixon told me as a friend that there was nothing doing, that he would not recommend any purchaser to buy these lots. . . . So far as my knowledge goes things were at an end then."

Nixon returned to Winnipeg, and Dowdle, having subdivided the property, went to work to sell it in lots. At the time of the negotiations with Nixon, Dowdle had promised to pay Macdonald a commission of $500 if the latter made a sale for him. Shortly after Nixon's return to Winnipeg, Macdonald received a telegram from Nixon, on receipt of which Macdonald saw Dowdle and arranged that Dowdle would sell for $50 an acre. Dowdle almost immediately changed his mind and demanded $55 an acre, and this offer was transmitted to Nixon. Prout, the person who eventually became the purchaser, then came to Swift Current. Prout saw Macdonald and told him he was the purchaser. Macdonald then saw Dowdle, but the latter refused to carry out the sale and asked $250 an acre. When this was communicated to Prout, the latter returned to Winnipeg. There is no evidence that Prout's name was mentioned to Dowdle at or before this occasion.

A week or two after Prout's visit, Nixon came to Swift Current and renewed negotiations with Dowdle. Both Macdonald and Nicholson, the manager of the Union Bank, to which bank Dowdle was indebted, were drawn into the transaction, and they used their influence with him to induce him to accept an offer of $55 an acre. Dowdle finally agreed to accept the offer, he stipulating that he was to have $9,600 clear profit to him. At the interview that took place, the four persons, Macdonald, Nicholson, Nixon, and Dowdle, were all present. Macdonald, Nicholson, and Dowdle all state that Prout's name was not mentioned, and that the

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understanding was that Nixon himself was the purchaser.

Immediately after this interview, a document was drawn up by Macdonald, signed by Dowdle and delivered to Nixon. The document is as follows:—

"In consideration of the sum of $100, receipt of which is hereby acknowledged, I John E. Dowdle, of Swift Current, do hereby agree to give to S. O. Nixon, of Winnipeg, the right to purchase all of my right and interest in land as follows: south half of sec. 19-15-13 W. 3rd, east half of sec. 18-15-13 W. 3rd, in the province of Saskatchewan, for the price or sum of $55 an acre, this option to be valid only until and including the 30th day of April, in this year 1911 A.D. Said sale to be subject to the provisions of agreement made the 30th day of March, 1911, between Thos. E. Pugh, of the city of Regina, and myself.

"It is further understood that this option is only binding if a clear title to the properties above-mentioned can be given, otherwise the consideration of $100 is to be returned to the said S. O. Nixon.

"It is further agreed that, in the event of the said S. O. Nixon exercising his right under this option to purchase the above mentioned properties, payments are to be made as follows:—

"The sum of $5,000 cash on the execution and delivery of the agreement of the sale from the said J. E. Dowdle, the sum of $4,500 on the 30th day of April, 1912, and the balance as follows: May 1st, 1911, $500; August 1st, 1911, $1,000; November 15th, 1911, $3,000; February 15th, 1912, $1,100; May 15th, 1912, $1,100; August 15th, 1912, $900: six annual equal payments of $3,000 each, to be paid on the 25th day of February, 1912, 1913, 1914, 1915, 1916, and 1917. Interest to be at the rate of 7 per cent. per annum.

"In witness whereof the parties to the agreement have set their hand and seal this twenty-seventh day of April, 1911.

"J. E. Dowdle
"S. O. Nixon.

"Witness:
"C. D. Macdonald."

The above document was put in evidence by the plaintiff, who attempted to prove by it that he had made a sale of the land. The document on its face shews that Nixon himself was the purchaser, and that he paid $100 for the option given by it to him.

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The learned trial Judge makes, in regard to the above document, the following finding: "I am satisfied that the defendant knew that the plaintiff Nixon was not the purchaser at the time of giving him the option, and that the option was given for the purpose of enabling Nixon to conclude a sale with Prout, which he succeeded in doing." I must say, with great respect, that in making this finding the learned trial Judge completely overlooked the evidence of Macdonald and Nicholson, two witnesses of high standing, both of whom had no interest in the subject-matter of this suit.

Macdonald's evidence on this point is:—

"Q. And from the conversation that took place, can you just give us your idea as to whether Mr. Dowdle was in any way given to understand that Nixon expected a commission? A. Not in any way.

"Q. From the tone of the conversation and the agreement as it was made, previous to signing the option, who was the prospective purchaser of this property as far as you remember? A. From the tone of the conversation, Mr. Nixon was purchasing the property.

"Q. That is what any one would understand from the conversation? A. That is what Mr. Dowdle would understand.

"Q. When you say Mr. Dowdle, do you mean that you had any further information yourself? A. I knew, of course, from what had passed previously, that Nixon himself was purchasing for another party.

"Q. Was that explained to Dowdle in any way at that time? A. No, it was not."

In Nicholson's evidence, after stating that Nixon, Macdonald, and Dowdle came to his office on the occasion in question, he was asked certain questions and gave answers as follows:—

"Q. What took place? A. Mr. Nixon said he was contemplating buying this property, and, as we were interested, should like to let us know that he was going to do something. Now, the price set, I think, was $10,000 on that.

"Q. What was the upshot of the thing? A. Well, the upshot of the thing was, I told Mr. Nixon I didn't think the bank wanted to stand in the way of Mr. Dowdle if he wanted to sell, if he wanted the sale to go through, and we were perfectly willing to let him sell it if he cared to sell

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it to him, and immediately after that Mr. Dowdle, Mr. Nixon, and Mr. Macdonald went over to the Royal Bank.

"Q. There is no doubt in your mind that Mr. Nixon was there, the gentleman in the room now? A. Oh, there is no doubt about that.

"Q. He was there in the room? A. Yes.

"Q. Was there any suggestion made of any kind of anybody being interested but Nixon? A. But Nixon?

"Q. Yes? A. Suggested how?

"Q. That he was interested otherwise than as a purchaser? A. No."

From a careful study of the evidence, I have come to the conclusion that Dowdle never heard of Prout in the transaction until after the option was given to Nixon.

On the 1st May, Prout appeared and took up the option Nixon had secured. The money required by the option to be then paid was paid by Prout, and the following receipt was given:—

"Swift Current, May 1st, 1911.

"Received from Geo. W. Prout, through S. O. Nixon, $500, being payment on purchase money of S. ½ of 19-15-13, also E. ½ of 18-15-13, at $55 an acre, given in pursuance of option dated the 27th day of April, 1911, made between J. E. Dowdle and S. O. Nixon.

"J. E. Dowdle."

Dowdle states that he did not meet Prout on that occasion, but he signed the above receipt prepared by Macdonald, in which Prout's name appears, and he must be taken to have received notice then that Prout was taking the place of Nixon under the option. The receipt shews on its face that it is given in pursuance of the option granted to Nixon.

On the 17th May, a formal agreement was executed by Dowdle at Swift Current, in the office of Mr. Smyth, a solicitor. Mr. Smyth gives a very clear account of what occurred on that occasion. Prout proposed that a clause should be put in the agreement that Dowdle should pay Nixon a commission. Dowdle, who was present objected strongly to this. Mr. Smyth says that he then suggested that an interview should take place between Dowdle and Nixon to arrange the matter. Accordingly, Dowdle went out, and, after an hour or less, returned with Nixon. Prout was not then present. Nixon claimed to be entitled to a commission, but Dowdle refused to sign the agreement if this was

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insisted upon. Finally Nixon said that he would not let the question of commission stand in the way of the deal going through and to go ahead with the papers. Dowdle then executed the agreement. The evidence of Smyth as to this interview is corroborated by Dowdle, and, to a certain extent, by Prout.

In reference to Smyth's evidence as to what took place at this interview, the trial Judge says: "I cannot but believe that the witness Smyth is mistaken, or that he has confused Prout and Nixon." With great respect, I must say that there is, in my opinion, no ground for such an inference. Smyth had first met Prout as the purchaser from Dowdle, and the terms of the agreement were discussed between Prout and Dowdle in Smyth's presence at his office. When the question of commission arose, Nixon was brought by Dowdle to Smyth at the office of the latter to discuss this question. I cannot believe that there was any such confusion as the learned trial Judge suggests.

The trial Judge appears to have been much impressed with a statement made by Dowdle that Nixon never claimed a commission, and that he never heard of such a claim except through the Court. No doubt, Dowdle does make that statement, but he took the ground all along that Nixon had not asked for a commission, and that he, Dowdle, had never agreed to pay his one. I think Dowdle meant his statement only to apply to what took place prior to the meeting of the 17th May. He distinctly states that, at this interview in Smyth's office, Nixon "told Mr. Smyth if the deal would not go through with commission to call it off, that he was not looking for anything and didn't want any."

I think, with respect, that the trial Judge, in dealing with the question, overlooked the effect of Nixon taking an option to purchase in his own name, an option which in fact was simply transferred to Prout. Even if the trial Judge's finding that Dowdle had agreed at the first interview to pay Nixon a commission, if the latter made a sale, be adopted, the taking of the option in Nixon's name imposed on the latter the onus of proving that, although he appeared as purchaser, Dowdle had again agreed that he should receive a commission. Far from establishing this, Nixon admits that, when the option was taken, nothing was said about commission, and no claim was made for commission until the sale had gone through. Further, when Nixon was ques-

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tioned as to his visit to Smyth's office on the occasion above referred to, the following strange and damaging passage is found in his evidence:—

"Q. What business were you there on? A. I could not tell you that, nothing to do with this case. I was sent for and asked for with regard to this case, but I didn't go there for that. The case went out of my hands after that.

"Q. You never did claim any commission? A. Emphatically no. I never did. I never claimed any after that. I told Mr. Dowdle I never asked for any commission, and I came into this thing when my partner, Mr. Gough, put this matter in the hands of Mr. Adamson."

In endeavouring to establish his case, Nixon is unfortunate enough to be contradicted on important points, not only by the defendant and by three independent witnesses, Macdonald, Nicholson, and Smyth, men filling important positions in their community; but also by the document forming the very foundation of the sale, a document which shews Nixon as a purchaser from Dowdle, and not as an agent of Dowdle.

I think Nixon completely failed to alter this position, and to shew that, notwithstanding the statements in the document, he was really an agent for the vendor; and that, notwithstanding his appearance in the guise of a purchaser, he had a contemporaneous agreement that the vendor would pay him a commission, when another man was produced willing to take his place as purchaser.

I think the appeal should be allowed with costs, the judgment already entered set aside, and a judgment entered for the defendant, with costs in the Court of King's Bench.

CAMERON, J.A.:—According to Nixon's evidence, he first saw Dowdle at Swift Current with reference to the property in question about the 1st April, 1911. Dowdle then spoke to him about subdividing the property and selling it in Winnipeg. It was suggested that Nixon should represent Dowdle in the matter. Nixon, however, advised against this project of subdivision, and it was dropped. A few days after this, Nixon says he saw Dowdle again, and arrangements were then concluded to sell the property at $55 per acre. "And if I made a sale of the property—it was stated in general terms—that if I made a sale of the property I was to receive 5 per cent." A day or two after this, Nixon re-

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turned to Winnipeg and succeeded in interesting D. W. Prout in the property. Prout went up to Swift Current to see Dowdle and the property, and Nixon went with him, either on this or a subsequent visit. When Prout came back, he told Nixon that the price had been raised to $250, but that he was willing to give $55. Nixon then went to Swift Current again, where he saw Dowdle, and Dowdle alone. He says:—

"I got talking to Mr. Dowdle again about the property, I told him then that Mr. Prout would still take the property if he would sell it at $55 an acre; and, after some talking and discussing the matter, considerable talking and discussing the matter or deal, Mr. Dowdle decided that he would take $55 an acre for the property."

"Q. And what was done? A. Mr. Prout said that he would not go back to Swift Current again unless he had something tangible, something to shew him that the property could be delivered, and Mr. Dowdle decided that he would take $55 for his property, sell it to Mr. Prout for that much money; and an option was drawn up."

The option was drawn up by Mr. Macdonald, the manager of the Royal Bank, in Nixon's favour, and Nixon says of it: "The option was drawn at the suggestion of Mr. Macdonald, and he simply drew the option and drew it in that form, the idea of the option was just simply that I might have something definite or tangible to shew Mr. Prout that we could deliver the property." He further says that, at the time the option was given, Prout's name was mentioned repeatedly in Dowdle's presence, and that all concerned understood that Prout was the real purchaser.

The option is dated the 27th April, and is expressed to be for the consideration of $100 then paid, and to be valid up to and inclusive of the 30th April only.

Nixon says he then telegraphed Prout, who came up and paid Dowdle $500, taking from him a receipt in the following form:—

"Swift Current, May 1, 1911.

"Received from Geo. W. Prout, through S. O. Nixon, $500, being payment on purchase-money of S. ½ of 19-16-13, also E. ½ of 18-15-13 at $55 an acre, given in pursuance of option dated the 2nd day of April, 1911, made between J. E. Dowdle and S. O. Nixon.

"J. E. Dowdle."

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The formal agreement was executed on the 17th May by Dowdle (at a subsequent date in Winnipeg by Prout) without any reference to Nixon, who was not present and did not consider himself interested in the transaction, so he says, after the payment of the $500.

Th foregoing is the history of the case from Nixon's point of view, which the learned trial Judge adopted. His claim is, that he had an express bargain for a commission on the sale of the property; that he secured a purchaser; and is, therefore, entitled to his remuneration. The option made out in his name was, he says, so expressed for the purpose of holding Dowdle to his offer, and of thereby satisfying Prout of his ability to secure a proper agreement from Dowdle, and for no other purpose; and that he was not and never intended to be a purchaser of the property; of all of which Dowdle was aware.

Nixon says, on cross-examination, that "the option was given for the express purpose of shewing that I could deliver the land, and when Mr. Macdonald drew the option he knew Mr. Prout was the purchaser; Mr. Dowdle knew that Mr. Prout was the purchaser; and, when Mr. Prout came upon the scene, he gave him $500, and I had nothing more to do with it."

Nixon is a clergyman of the Presbyterian denomination, who, owing to illness, had discontinued his active connection with the Church and had diverged into the real estate business, though not to the extent of wholly renouncing his former vocation, as the evidence shews. The story told by him in the witness-box covers a short period of time, comprising three visits to Swift Current and a few interviews with Dowdle, the vendor, and Prout, the purchaser. Yet that story is challenged at practically every material point by other witnesses, and in some particulars by his own evidence. It is also at variance with the documentary evidence, as it is manifest that the option (or agreement for sale) made by Dowdle, as vendor, directly to Nixon, as purchaser, is absolutely destructive of any agency agreement previously existing, if there had been such. If we are to accept Nixon's story that the option was merely a means to an end, and this to Dowdle's knowledge, and that its effect is inoperative so far as any previous agreement of agency is concerned, then it is surely necessary that the plaintiff's claim, as set out in the pleadings, be satisfactorily and con-

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clusively established, and that the evidence nullifying the effect of the documentary evidence be of the most convincing character before we can disregard it.

The account of the transaction given by Dowdle is very different from that of Nixon. When asked if he remembered the conversation in the course of which Nixon said he had promised him 5 per cent. commission on the sale of the property in question, he said: "If I was to be struck dead this minute I never mentioned a 5 per cent. commission to him."

Dowdle says Mr. Macdonald introduced Nixon to him as a prospective buyer; that, a couple of days after the introduction, he went with Nixon to the office of the Union Bank, where he, Nixon, Nicholson, the manager of the Union Bank, and Macdonald, the manager of the Royal Bank, talked the matter over, and he (Dowdle) states that the amount of $10,000 profit arising out of the transaction, to be net to him, was mentioned at this conference. Dowdle says that he and Nixon and Macdonald then went to the office of the Royal Bank, where Macdonald drew up the option at $55 an acre, which gave Dowdle $9,600 net, instead of $10,000, whereupon objection was made by Dowdle, who says he finally agreed to take the $9,600. Dowdle swears that he said at the time, "I will take the $9,600, $9,600 net profit to me, no commission to be paid and no commission to you (Nixon)." He further stated to the presiding Judge that the option was made out in Nixon's name, and that he sold the property to him (Nixon) at $55 an acre net, and that Nixon never asked for commission until proceedings were taken.

Mr. Nicholson says that he was present at the interview with Nixon, Macdonald, and Dowdle, and that Nixon there and then stated that he was contemplating buying the property. Mr. Nicholson states positively that it was not suggested that Nixon was interested other than as purchaser.

Nixon's statement is, that he told Dowdle that Prout was the purchaser: "A. Mr. Dowdle knew that the option was being drawn and that the property was to be purchased by Mr. Prout, notwithstanding that the option was being drawn in my name and Mr. Macdonald knew that, and I knew it. Q. How did Mr. Dowdle know that? A. Because I had mentioned Mr. Prout's name to him right at the very start when I got into contact with him." This last answer

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is difficult to understand. If the last "him" refers to Dowdle, the answer is clearly erroneous, according to Nixon's own evidence in chief. If it refers to Prout, it must also be erroneous according to Nixon's evidence, because he (Nixon) did not go up to Swift Current to see Dowdle until after Prout's return with the information that Dowdle had raised the price of the land to $250 per acre. Dowdle says, on the other hand, that, when the option was signed, he did not know of Prout's existence. Macdonald says that, at the meeting when the option was signed, Nixon was taken as the purchaser, and that it was not explained to Dowdle in any way that Nixon was purchasing for another person. Nicholson says that Nixon was the purchaser, and there was no suggestion of any one else being interested.

Dowdle's statement that Nixon never asked him for a commission until the commencement of the action is contradicted not only by Prout and by Nixon, but by Smyth, who says that Nixon did ask him, on the occasion when Nixon and Dowdle met in Smyth's office at the time of the execution of the agreement by Dowdle, about the 16th or 17th May, and that Nixon then abandoned his claim to any commission rather than interfere with the consummation of the sale. As to this statement Nixon says, when recalled, that he never made any such agreement to abandon, and "never for one moment" understood that he had abandoned his claim. Nixon said he had never spoken about his commission to any one but Dowdle, but he did not adhere to this story, as he says he discussed it with Macdonald. He denied that any of the parties had seen him with reference to the agreement when it was being drawn up and concluded. "Q. I want you to be very particular about the time that this agreement was executed, because we have some evidence to the contrary, that one of the parties, Mr. Dowdle, absolutely declined to sign this thing unless it was perfectly clear that you were not entitled to any commission. Did anybody go out to see you about that? A. No. Q. To see you about that at all? A. No, I don't remember the first thing about it." This was in Nixon's original cross-examination. Smyth, in his evidence, gave a circumstantial account of what took place in his office on the occasion of the meeting above referred to, when Nixon, on the one hand, claimed a commission, but Dowdle, on the other, declared that he had given the option to Nixon; that, if he

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(Nixon) had substituted any one else, it was none of his (Dowdle's) business; that the price was a net price; and that, "if they were not satisfied with it in that way, the deal was off, and that he (Dowdle) would keep the property." Finally Nixon said: "He would not let the question of commission stand in the way of the deal going through." After Smyth had given this evidence, Nixon, recalled, was cross-examined as follows:—

"Q. You also told me yesterday you never attended any meeting in Mr. Smyth's office in connection with this agreement? A. Neither I did.

"Q. What Mr. Smyth has told us this morning is all wrong, is it? A. Mr. Smyth is absolutely wrong in this statement that he makes about Mr. Dowdle and I discussing the commission.

"Q. Were you present in his office? A. I may have been in his office once or twice, but I was not there officially, I was never there directly in connection with this business.

"Q. It was not true what you said yesterday that you were not there? A. Directly in connection with this matter, and that is what I understood.

"Q. You told me yesterday that you were not there? A. Yes.

"Q. Now you admit that you were there? A. Yes, but not in connection with this business, to discuss the business of commission with Mr. Dowdle."

On his cross-examination, Nixon said distinctly that he never spoke to anybody about this commission except to Mr. Dowdle. Later, he admitted, however, that there had been a discussion on the subject by him with Macdonald—"the suggestion was made to me, in fact, in connection with that commission, by Mr. Macdonald suggesting that clause himself." But Macdonald's evidence is, that Nixon repeatedly asked him to see the solicitors and see that a clause was inserted that the usual commission of 5 per cent. was paid. Confronted with this statement, Nixon gave it a positive denial.

There are two other important points on which there is a conflict of evidence. Dowdle says that, after the option was drawn up by Macdonald, he noticed that the sale for $55 per acre did not give him $10,000 net, but $9,600, and objected, but that Nixon said that $9,600 was over $9,000, and was called $10,000. Thereupon Dowdle said: "I will take the $9,600, $9,600 net profit to me, no commission to be

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paid and no commission to you." This is positively denied by Nixon. But Macdonald is clear on this. Nicholson's evidence is apparently to the same effect. Dowdle also states that Nixon found fault with his title to the property. Nixon denies this: "Q. You remember raising the question of the flaw in the title? A. No, I do not; I never did; why no, I never raised it; I knew nothing about the title." "Q. Did you never make any suggestion as to the title? A. No, I could not and never did in my life." Nicholson, however, says it was Nixon who suggested a flaw in the title.

At the interview when the option was drawn up and signed, there were present, according to Nicholson, Dowdle, Nixon, Macdonald, and himself. Nicholson gives in detail what then occurred and what Nixon then stated. Originally Nixon denied seeing Nicholson at all. But Nixon, when recalled, explains why he and Dowdle went—"to explain to Mr. Nicholson the facts of the prospective sale of the property." On cross-examination, Nixon gave the following evidence:—

"Q. I think you also told us that you never met Mr. Nicholson in your life about this matter, didn't you? A. So far as the sale of the property was concerned.

"Q. So far as anything was concerned? A. No, I never said that, I never met Mr. Nicholson; I never said that I never met Mr. Nicholson; I never said that; but not in connection with the sale of this property.

"Q. You don't deny now that you met him, that you were present at that interview with Mr. Nicholson and the others in the Union Bank, or do you? A. I think it is already explained.

"Q. I am asking you the question? A. I am trying to answer your question, Mr. Galt, that the suggestion was made, not by me at all, but by either Mr. Dowdle or Mr. Macdonald, I can't tell you which, but Mr. Nicholson was interested as a matter of fact, and that appeared on some previous conversation with Mr. Nicholson that Mr. Nicholson was interested as far as Mr. Dowdle was concerned.

"Q. I am not asking you about that; I am asking you if you were present at that interview that has been spoken of. Were you present? A. I was present when they went up to see Mr. Nicholson, if he would consent to the sale of the property, and he was satisfied."



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It is the fact that Prout says that Dowdle told him he expected to pay Nixon a commission. This was on the occasion of the third of the three visits that Prout made to Swift Current in this matter, after the receipt, but before the formal agreement was given. Subsequently, he (Prout) says, he drew attention to the fact that there ought to be some clause in the agreement about Nixon's commission. He was asked:—

"Q. Now, do you remember what Mr. Dowdle said to that? A. Mr. Dowdle said that he didn't expect to pay Nixon a commission. . . .

"Q. Mr. Macdonald suggested that to you? A. Yes, Mr. Macdonald suggested that to me.

"Q. Mr. Nixon didn't? A. He may have suggested it. I mean he may have discussed it."

These two statements were apparently made, according to Prout, while he was having the title to the property put in order, and he says they were at least a day apart. It is difficult to see how it can be said that Prout's evidence corroborates the plaintiff's story.

As to the meeting in Smyth's office: on his cross-examination, Nixon denied having seen any of the parties with reference to the matter after the option was obtained; and specifically denied, when recalled, any abandonment of his commission in Smyth's office. Dowdle states positively that Nixon was present at this meeting, and that Nixon there told Smyth: "If the deal would not go through with commission, to call it off; that he (Nixon) was not looking for anything and didn't want anything." Smyth, as I have noted, goes at considerable length into the details of this conference, and fully corroborates Dowdle. On cross-examination, Nixon did not adhere to his story that he had not seen any of the parties after the option was signed. An extract from his cross-examination is given above. At the conclusion of his cross-examination when recalled he is asked by the trial Judge:—

"Q. You do recollect being in Mr. Smyth's office? A. Yes." And later on, by Mr. Galt: "Q. You have heard Mr. Smyth swearing that you were in his office? A. I am not swearing I was not."

Now, there was no allusion at that meeting by Nixon to his claim for commission as originally made. And, if any claim arose, whether at the inception, during the progress,

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that he abandoned his claim in order to allow Dowdle to bring it to a determination on that understanding, then it would be singular indeed if the plaintiff could be permitted to press his claim to a successful conclusion.

The events connected with the meeting in the office of Smyth and Begg, taken as established, can be looked at in two ways. In the first place, there was the failure of Nixon to press his claim for commission on the basis of the original agreement as alleged by him. In the second place, there was a distinct waiver or abandonment by him of any claim for commission as a result of which Dowdle proceeded to, and did, complete the transaction, which he would not otherwise have done. It seems to me that there can then be no escape from the conclusion that it is not now open to the plaintiff to assert a claim under the original alleged agreement or otherwise.

It is true that this matter of defence is not pleaded as such; but the facts have been placed in evidence, and are before us for consideration. Besides, an estoppel in pais in general need not be pleaded to make it obligatory: Freeman v. Cooke, 18 L. J. Ex. 114; Ruling Cases, vol. 11, p. 82. The party, without pleading it, may take advantage of the estoppel derived from the rule laid down in Pickard v. Sears, 6 A. & E. 474. See Williams Saunders, 325a, note (d). Even if that be not the rule, under our present system of pleading, there would be no difficulty in making an amendment to conform with the evidence.

I have much hesitation in differing from the learned trial Judge in his findings. No doubt, he had advantages at the trial that are not available to us in appeal. But it does seem to me that the plaintiff has not adequately met the requirement to establish beyond a reasonable doubt the existence of the agreement to pay a commission alleged by the statement of claim, a requirement primarily imposed by the admission of documentary evidence introduced by himself. And this requirement is strengthened by the nature of his own evidence and of the antagonistic evidence put in by the defence.

I have not lost sight of those portions of the evidence that point in favour of the plaintiff's contention. It is true that Macdonald looked upon Prout as the real purchaser; but he does not go so far as to say that Dowdle knew this.

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Macdonald says that the option was drawn at his own suggestion, and for the purpose indicated by Nixon; and the fact that Nixon telegraphed Prout, and that Prout forthwith came to Swift Current, together with the fact that the option was for three days only—all these go to support the plaintiff's view. It is also the fact that Dowdle's evidence is in places open to the charge of inaccuracy, and is wanting in clearness. Notwithstanding these facts, which cannot be gainsaid, I must express my humble opinion that the plaintiff has not met the necessities of this case; that he has not succeeded in displacing the effect of the documentary evidence; that his own evidence is unsatisfactory and inconsistent with itself in important particulars; and that his halting and uncertain denial of the meeting in Smyth's office cannot be accepted. I think that the learned trial Judge did not attach sufficient weight to the effect of the documentary evidence, and that the plaintiff has not given such a clear, straightforward, and convincing account of the circumstances as to enable him to surmount the formidable obstacles standing in the way of his success in this case.

HOWELL, C.J.M., concurred.

*Appeal allowed.*

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## MANITOBA.

MACDONALD, J. APRIL 9TH, 1912.

TRIAL.

### SIEMENS v. DIRKS.

*Registry Laws—What Constitutes Registration — Registry Act, sec. 51—Priorities—Deed — Mortgage — Counterclaim—Occupation Rent.*

Under the Registry Act now in force in Manitoba, R. S. M. ch. 150, a deposit of an instrument for registration is not registration; and there is no registration until the certificate is indorsed as provided by sec. 51 of that Act.

*Harris* v. *Rankin*, 4 Man. L. R. 115, distinguished.

It is the date of the indorsement which governs; not the date of the deposit certified to by the indorsement.

And *held*, that in this case the deed to the defendant L. from the defendant D. was registered prior to the mortgage to the plaintiff from the defendant D., although the mortgage was first deposited; and that the defendant L. had no notice or knowledge of the plaintiff's mortgage until after the completion of his purchase from the defendant; and, therefore, the plaintiff was not entitled, as against the defendant L., to enforce his mortgage.

*Held*, also, that the defendant L.'s counterclaim for occupation rent could not be sustained.

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A mortgage action.

E. K. Williams and H. F. Tench, for the plaintiff.

A. E. Hoskin, K.C., and P. J. Montague, for the defendant Long.

MACDONALD, J.:—The question involved in this action is one of priority of registration.

The plaintiff is a mortgagee of certain lands in the village of Gretna, in the province of Manitoba, under an indenture of mortgage, dated the 5th April, 1905, made by the defendant Dirks, indorsed upon which is a certificate of registration, dated the 26th April, 1906, and signed by the Deputy Registrar of the district in which the lands are situate, the registered number being 26084.

The defendant Long is a grantee of the same lands from the defendant Dirks, under deed dated the 20th January, 1906, and registered in the registration division in which the lands are situate, on the 1st May, 1906, as No. 26063.

The plaintiff brings this action for payment of the principal and interest due under the said mortgage, alleging that the defendant Long has, since the giving of the said mortgage, acquired and is the owner of the equity of redemption in the said lands, and is in possession thereof, and asks that, in default in payment, the equity of redemption in the said lands may be foreclosed.

The defendant Long purchased the property from his co-defendant without any knowledge of the mortgage to the plaintiff. On the 5th May, 1906, the defendant Long received an abstract of the said lands from the proper registry office, signed by the Registrar, the last instrument appearing thereon as having been registered being a deed from the plaintiff to the defendant Dirks, dated the 1st April, 1897, and registered on the 24th April, 1897, as No. 16140. After registration of the deed from the defendant Dirks to his co-defendant, the latter received a continued abstract, signed by the Deputy Registrar, shewing the deed from his co-defendant Dirks to him as the only instrument affecting the said lands subsequent to the deed (No. 16140) from the plaintiff to the defendant Dirks.

It is quite evident from the books of the registry office that the entries in such books, which are intended to indicate the order of the registration of instruments, were first made in respect to the deed to the defendant Long.

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The abstract-book shews that this deed was received on the 1st May, 1906, as No. 26063, the only other prior instrument affecting these lands being the deed from the plaintiff to the defendant Dirks.

According to the receiving-book, at p. 165, the deed (No. 26063) to the defendant Long was received on the 1st May, 1906, as No. 26063, whereas at p. 166 the mortgage is made to appear as having been received on the 26th April, 1906, as No. 26084—clearly out of its order—and the entry was made not earlier than the 7th May, 1906.

The mortgage, I find, was the first instrument received for registration, having been received on the 26th April, 1906, the deed having been received 1st May, 1906; the omission to make the entries in their proper order being unaccounted for.

Under these conditions, the question is, which instrument is entitled to priority?

The plaintiff contends that his mortgage was registered when deposited with, that is, received by, the Registrar for that purpose, and cites in support of his contention the case of Harris v. Rankin, 4 Man. L. R. 115.

The mortgage, as stated, was received by the Registrar for registration on the 26th April, 1906, and should have been registered on that date.

The case of Harris v. Rankin, in so far as it decides the question of registration, was an interpretation of the sections of the Lands Registration Act of Manitoba, C. S. M. 1880 ch. 60. Section 15 of that Act provided for the manner of registration of grants from the Crown, and "all other instruments excepting wills shall be registered by the deposit of the original instrument or by deposit of a duplicate or other original part thereof with all the necessary affidavits." Section 30 provided that "all instruments that may be registered under this Act shall be registered at full length," etc. Section 31 provided that, "in case one or two or more original parts is registered, the Registrar shall indorse upon each of such original parts a certificate of such registration," etc. —shewing clearly that the indorsement was not part of the registration. Section 32 provided that the Registrar or Deputy Registrar of the county in which the lands are situate, shall, upon production to him of the instrument for registration, do certain things: among them, that he shall indorse a certificate on every such instrument, to the

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effect, etc. These duties devolving upon the Registrar are not a part of the act of registration. Section 15 provided that which was to be done to effect registration, namely, the deposit of an instrument for registration.

The Registry Act now in force, however, R. S. M. ch. 150, which applies to this case, differs from the Act interpreted by Harris v. Rankin. Section 50 is the governing section, and settles what constitutes registration: "The Registrar shall, upon production to him of the original instrument or instruments or the requisite exemplification or certified or sworn copy of instrument, indorse a certificate on every such instrument or copy to the effect or purport of the form in schedule A to this Act, and shall therein mention the year, month, day, hour, and minute in which such instrument is registered, and the number of registration; and, when such certificate is so indorsed and signed by the Registrar on the original or any duplicate original or on any such exemplification or copy, the instrument or document bearing such certificate shall be deemed to be registered as of the time mentioned in such certificate," &c.

A deposit of the instrument for registration is not now, therefore, a registration thereof; and there is no registration until the certificate is indorsed as provided by the statute.

It is urged, however, on behalf of the plaintiff that the indorsement on the mortgage certifies to its registration on the 26th April, 1906, at 10.04 a.m.; and, although this certificate was not indorsed until the 7th May, 1906, yet that the registration must be held as of the date mentioned in the certificate—in effect, that the Registrar can, if he sees fit, by falsifying the date of registration, give priority to an instrument deposited for registration after one of a prior registration.

I find that the deed to the defendant Long was registered prior to the mortgage to the plaintiff, and that this defendant had no knowledge of this mortgage until after the completion of his purchase of the property.

The plaintiff is not, therefore, entitled to a foreclosure of the equity of redemption or other redress against the defendant Long; and as against this defendant the action is dismissed with costs.

As against the defendant Dirks, the plaintiff is entitled to judgment for the amount sued for, together with costs.

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The defendant Long, by way of counterclaim, claims from the plaintiff a sum of money for rent of the premises during the time of occupation thereof by the plaintiff after this defendant became the owner thereof.

I find that the relation of landlord and tenant did not exist between the parties, and this counterclaim cannot be sustained, and I dismiss the same without costs.

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## MANITOBA.

MATHERS, C.J.K.B. APRIL 10TH, 1912.

### SMITH v. ERNST.

*Vendor and Purchaser—Contract for Sale of Land out of Jurisdiction — Specific Performance — Action by Purchaser—Parties in Jurisdiction—Remedy against Second Purchaser with Notice—Agreement to Give Torrens Title —Damages in Addition to Specific Performance.*

**Specific performance of an agreement for the sale of land situate out of the jurisdiction may be decreed, where the parties are within the jurisdiction, even against a purchaser from the original vendor, if he has notice of the agreement.**

**Where the agreement was, that the plaintiff should have a Torrens title to the land, and the land had not been brought under the Land Titles Act, judgment was given for specific performance, plus the cost of bringing the land under the Act, as damages.**

Action for specific performance of a contract for the sale of land by the defendant Ernst to the plaintiff.

W. H. Trueman, for the plaintiff.

E. T. Leech and F. J. Sutton, for the defendant Just.

The action had been discontinued as against the defendant Ernst.

MATHERS, C.J.K.B.:—On the 6th September, 1907, the plaintiff entered into an agreement with the defendant Ernst to purchase from him two lots in the city of Port Arthur, in the province of Ontario, for the purchase-price of $130, payable $10 in cash and $4 per month until the whole amount was paid. The defendant Just negotiated the sale on behalf of Ernst, who did not personally appear in the transaction at all.

In negotiating the agreement, the plaintiff stipulated with Just that he should be given a Torrens title to the land. When the first agreement was tendered by Just to

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stipulation; and the plaintiff refused to execute it. The defendant Just made the necessary change, and it was then executed by the plaintiff.

The cash and all subsequent payments were made to the defendant Just, who gave receipts therefor in the name of the Canadian German Realty Company, per himself.

In May, 1908, after the plaintiff had made the cash payment of $10 and eight of the monthly payments of $4 each, the defendant Just took a conveyance of the land in question, with a quantity of other lands, from the defendant Ernst, subject to the plaintiff's agreement. At that time Ernst had not a Torrens title to the land, and of course did not convey by such title to the defendant Just.

The plaintiff continued to make his monthly payments to the defendant Just as he had previously done, and was given receipts in the same form; but thereafter the Canadian German Realty Company received the moneys as agent for the defendant Just.

In December, 1909, the defendant Just told the plaintiff that he had taken over the land, and asked him if he would accept an old system title. The plaintiff declined to do so, and Just replied that he had a good mind not to receive the payment unless he consented to take an old system title; but the plaintiff still refused, and Just then accepted the payment.

After the plaintiff had made all the payments and demanded the title which his agreement called for, the defendant Just refused to give him a Torrens title, but offered an old system title, which the plaintiff refused. Some negotiations then took place between them, which resulted in Just verbally agreeing to pay the plaintiff $250 for a release of his claim upon the land. The plaintiff verbally agreed to accept this amount in full discharge of his claim; but, after repeated promises to carry it out, Just refused to do so, on the ground that he was not bound. The plaintiff then brought this action for specific performance, or for a return of the money and damages.

The fact that the land is out of the jurisdiction is no reason why specific performance should not be ordered as against the defendant Just, where the parties are within the jurisdiction: Dart on Vendor and Purchaser, p. 1023; and it may be enforced against a purchaser of the land who takes with notice of the agreement: Dart, p. 1030.

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In this case, not only had Just notice of the agreement, which was in fact negotiated by himself, but, after taking over the land, subject to the agreement, he received from the purchaser the greater part of the purchase-money, with a full knowledge that the agreement contained a stipulation that the plaintiff should get a Torrens title. More than that, he accepted an instalment of purchase-money when he knew that the plaintiff would accept no other title from him. Under the circumstances, I have no doubt about the Court's power to grant the plaintiff relief as against the defendant Just.

The defendant's counsel contended that the Court had no jurisdiction, and cited the cases of Norris v. Chambres, 3 DeG. F. & J. 583; Whitaker v. Forbes, L. R. 10 C. P. 583; Henderson v. Bank of Hamilton, 23 S. C. R. 716; and Deschamp v. Miller, [1908] 1 Ch. 856. I have read all these cases, but they decide only that the Court has no jurisdiction to enforce a lien or charge upon land out of the jurisdiction, unless there is privity of contract, express or implied, between the parties, or unless there exist between them personal equities, fiduciary relation, fraud or unconscionable conduct.

The Court is not asked, in this case, to deal with the land, but merely to compel the defendant Just, by a judgment in personam, to carry out an agreement upon the faith of which the plaintiff paid, and Just received, the consideration moving from the plaintiff.

The Court cannot possibly compel Just to apply for and obtain a Torrens title for the purpose of conveying the land by such title to the plaintiff; but it can compel a conveyance by such title as the defendant has, plus damages for breach of agreement to give a Torrens title: Fry on Specific Performance, par. 1309.

There will be judgment for the plaintiff for specific performance of the contract. There will be a reference to the Master to ascertain the cost of obtaining a Torrens title to the land, if the parties cannot agree upon the amount; and the plaintiff will have judgment against the defendant Just for the amount so found or agreed upon as damages, together with the costs of this action and of such reference.

Any amendments to the statement of claim necessary to give the plaintiff this relief may be made.

Further directions may be reserved, if necessary.

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## MANITOBA.

PRENDERGAST, J. APRIL 11TH, 1912.

TRIAL.

## CHAPDELAINE v. WILKINSON.

*Mortgage — Claim for Instalment and Moneys Paid for Insurance — Demand — Assumption of Liability — Price of Goods Sold—Costs.*

**The plaintiff claimed $300 for an instalment of moneys under a mortgage and $105 paid for insuring the mortgaged premises; also $200 for goods sold and delivered and $37.50 paid for insuring the goods. The defence was, that, by agreement with the plaintiff, the defendant assumed a liability for $542.97 due by the plaintiff to a trading company, of which $200 was to be applied in satisfaction of the price of the goods sold, and the balance on the mortgage; that no demand was made for the moneys paid for insurance. The defendant also alleged that only $175 was due to the plaintiff, and he brought that sum into Court:—**

***Held*, upon the evidence, that the claim for moneys paid for insurance on the goods failed; but that for insurance on the mortgaged premises should be allowed, a demand having been made; that the defendant's statement of account was correct, the amount due to the plaintiff being only $175, for which he was entitled to judgment; that the plaintiff should have general costs up to the trial and costs of the trial upon the issue as to the demand; and that the defendant should have his costs of the trial on the issue as to the defendant assuming the plaintiff's liability to the company.**

Action to recover mortgage moneys and other moneys.

N. F. Hagel, K.C., for the plaintiff.

J. W. Wilton, for the defendant.

PRENDERGAST, J.:—The plaintiff claims: (1) moneys due under a mortgage made by the defendant to the plaintiff, the plaintiff alleging default in payment of an instalment of principal of $300 due on the 1st September, 1911, and repayment of $105 paid for insurance on the mortgaged premises, as agreed; and (2) $200 for goods sold and delivered and $37.50 paid for insurance on the said goods—the mortgaged premises being hotel premises in the village of Cardinal, and the goods and chattels being stock in trade in the said hotel.

The defence is substantially to the effect that, by agreement with the plaintiff, the defendant assumed a liability of $542.97 due by the plaintiff to the Richard Beliveau

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Company, of which $200 was to be applied in satisfaction of the stock in trade, and the balance of $342.97 on the mortgage; and that, as to the moneys paid by the plaintiff for insurance on the mortgaged premises, no demand was ever made for the same. The defence also sets out a statement of account between the parties, shewing a balance due the plaintiff of $175, which the defendant pays into Court.

The evidence, in my opinion, fully supports the grounds of defence, except the allegation that no demand was made by the plaintiff to the defendant for reimbursement of the premium of insurance on the mortgaged premises.

Joseph Giroux swears that he was at the time the secretary-treasurer and head book-keeper of the Richard Beliveau Company Limited, and that Mr. Beliveau, the president of the company, before leaving for California, where he then was, had left him with full authority to deal with and settle such matters as this one. Giroux says that, as the plaintiff was going out of the hotel business at Cardinal, and as Wilkinson was succeeding him in the same, and was desirous of also taking his supplies from the company, it was considered desirable by the three that the defendant should assume the plaintiff's liability of $542 97, so that the company would then have to deal only with one party.

The plaintiff, although asserting that he was told by Giroux that he was not released, admits that it was desirable for him that such an arrangement be made, as he was receiving only $1,000 cash from the defendant on the sale, and was in no way desirous of taking more than half of it to repay the company.

Giroux produced the original ledger accounts of the plaintiff and defendant, shewing the first closed on the 28th April, "By P. C. Wilkinson $542.97;" and the latter opening with the entry, "To T. Chapdelaine, $542.97"—explaining the date of the entries by saying that he considered the matter closed only from the time that the transfer of the license from the paintiff to the defendant was effected, that is to say, from the time that the defendant would be in a position to deal with them. Giroux also produced exhibit 9, which is a statement of the plaintiff's account with the company, shewing a balance due of $542.97, and with the words at the foot thereof, "This amount has been transferred to Mr. P. C. Wilkinson, subject to transfer of license," and signed by both the plaintiff and defendant.

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Giroux, moreover, says that the company, having advanced the defendant $200 worth of goods at that time, making $742.97 with the assumed indebtedness, took from the defendant for the said total a chattel mortgage, which he also produced.

Giroux is emphatic that the expressed intention of all parties was, that the plaintiff should be released, and swears that he, Giroux, told the latter that he was so released.

Giroux's evidence was also to the effect that the amount of the assumed indebtedness was to be applied on the $200 stock in trade *or* on the mortgage. The plaintiff says that it was to be applied on the mortgage only, which is not reasonable: why should it be made to apply on mortgage instalments not yet due, when payment for the stock in trade was due? The defendant says that it was to be applied first on the stock in trade, and that would also be the course most favourable to the plaintiff, as he was secured by the mortgage for the purchase-price of the premises.

This being so, the claim for insurance on the stock in trade of course fails.

I find the statement of account set out in the defence to be correct. It shews a balance of $175 due the plaintiff, which the defendant has paid into Court.

I find, as stated, that there was a demand made by the plaintiff to the defendant for reimbursement of the moneys paid for insurance on the mortgaged premises. The defendant was then in default when the action was instituted, and the plaintiff is then entitled at all events to costs up to trial.

What as to costs of trial? The plaintiff could not get even his costs up to trial without shewing the demand for the insurance moneys. This he did by production of exhibit 12. He was not justified, however, in putting the defendant to his whole defence.

There will be judgment for the plaintiff for $175, in satisfaction of which the amount paid into Court is to be applied. The plaintiff will have costs up to trial and costs of trial as to the issue on the demand for the insurance moneys. The defendant will have his costs of trial on the issue as to the defendant assuming the plaintiff's liability to the company.

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## BRITISH COLUMBIA.

APRIL 1ST, 1912.

COURT OF APPEAL.

## BROWN v. MOTHERLODE MINING CO.

*Pleading — Statement of Defence — Trespass to Land — Application to Purchase from Crown.*

**It is no answer to an action for trespass to land to say that the defendants' assignor had applied to purchase the land from the Crown.**

**Order of HUNTER, C.J.B.C., striking out parts of the statement of defence affirmed with a variation; IRVING, J.A., dissenting as to the variation.**

Appeal by the defendants from an order of HUNTER, C.J.B.C., in Chambers, striking out paragraphs 4 and 15 of the statement of defence as embarrassing.

The appeal was heard by MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Harold Robertson, for the defendants.

Maclean, K.C., for the plaintiff.

GALLIHER, J.A.:—I would vary the order appealed from to the extent of allowing paragraph 4 of the statement of defence to stand, up to and including the word "Crown" in the second line thereof; the remainder of the plea is embarrassing and was rightly struck out.

Admitting that application had been made by McMartin to purchase these lands from the Crown, that did not give him or his assigns any interest (legal or equitable) in the lands, and is no answer to an action for trespass: see Wilson v. McClure, 16 B. C. R. 82, and cases there cited.

As the learned Chief Justice who made the order gave leave to amend, the defendants should pay the costs of appeal.

MACDONALD, C.J.A., concurred.

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IRVING, J.A.:—I would dismiss this appeal.

In Harper v. Charlesworth (1825), 6 B. & C. 574, it was decided that a person having the actual possession of Crown land, with the concurrence of the Crown, can maintain trespass against a wrongdoer. Holroyd, J., points out in that case that an entry on the possession of another cannot be justified unless it is made by the authority of a person in whom the right of soil is vested.

It is useless for the defendants to refer to the interest of John McMartin. He has no vested right of soil: Wilson v. McClure, 16 B. C. R. 82.

The defendants, I think, should be at liberty to plead that the plaintiff's claims were invalid as not being on the waste lands of the Crown.

*Order varied;* IRVING, J.A., *in part dissenting.*

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## BRITISH COLUMBIA.

APRIL 1ST, 1912.

COURT OF APPEAL.

## RICHARDS v. VERRINDER.

*Conspiracy—Rejection of Candidate at College Examination —Evidence — Undermarking of Examination Papers— Destruction of Papers of other Candidates—Nonsuit.*

**In an action against a dental college, the secretary of the college, and the examiners appointed by the college to examine candidates for admission to practise as dentists, for conspiracy to prevent the plaintiff's admission, by refusing, upon his answers to the questions set by the examiners, to award him the full number of marks to which he was entitled, the plaintiff was *held* to have been properly nonsuited at the trial, although there was some evidence indicating that his answers had been under-marked, and although it appeared that the papers of answers of the other candidates had been destroyed since the action was begun, but before a request was made by the plaintiff for their production, and that they were destroyed before the time for destruction prescribed by the rules of the college had arrived, the uncontradicted evidence of the secretary being that they were accidentally destroyed—these circumstances not affording evidence of a conspiracy which should have been submitted to the jury.**

Appeal by the plaintiff, in an action for conspiracy, from the judgment of nonsuit pronounced at the trial by GREGORY, J.

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The appeal was heard by MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

W. J. Taylor, K.C., for the plaintiff.

Bodwell, K.C., for the defendants.

MACDONALD, C.J.A.:—The plaintiff, having complied with all the preliminaries prescribed by the Dental Act, being ch. 2 of the Acts of British Columbia, 1908, presented himself for examination for admission to the College of Dental Surgeons. He was denied admission, on the ground that he had fallen short of obtaining the percentage of marks prescribed by the by-laws of the college. He then brought this action against the college and the examiners, charging that "the defendants and each of them wilfully and fraudulently conspired together to prevent him, the said plaintiff, from entering said college, by refusing to give him the full number of marks to which he was properly entitled in such examination by virtue of the answers made by him to the questions put at such examination; that the defendants and each of them have subsequently refused to give to the plaintiff any information whatsoever concerning the said examination, either as to the number of marks he obtained, the subjects, if any, in which he failed, or the method upon which marks in the said examination were allotted to each candidate; and the plaintiff will say that by his answers to said questions he was entitled to enter said college, but that the defendants and each of them either marked or caused to be marked his papers incorrectly, or not at all, and this for the purpose, well known to each of them, of fraudulently preventing him from entering said college."

The plaintiff claims: (1) discovery of all matters and proceedings of the council with reference to his aforesaid examination; (2) discovery of the questions put therein and his answers thereto and the report of the examiners thereon; (3) damages; (4) such other relief as the nature of the case may require.

Before trial, the defendants were ordered to produce the plaintiff's examination papers. Subsequently, an application was made to a Judge for an order that the defendants should produce the examination papers of the other candidates at that examination. This was contested by the defendants; but, on finding that the Court was about to order the production of these papers, an affidavit of the defendant

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Verrinder was produced shewing the loss or destruction of these papers.

Such loss or destruction is one of the principal matters relied upon by the plaintiff as evidence of the misconduct charged against the defendants. Only one other matter was seriously relied upon as shewing such misconduct—the alleged under-marking of the plaintiff's papers. At the trial, witnesses were called by the plaintiff to prove that he was not given the number of marks which his answers entitled him to. These witnesses went over the questions and answers and gave their opinions as to how they ought to have been marked. In some cases they would have given higher marks, in others lower; but the net result, according to their evidence, is, that the plaintiff ought to have been given in the aggregate about 10 per cent. higher marks than were allowed him by the college examiners.

The case then narrows down to this: can it be fairly inferred from the loss or destruction of the other candidates' papers by the secretary of the college, Dr. Verrinder, and from the alleged under-marking of the plaintiff's papers, that the fraudulent conspiracy which the plaintiff alleges existed? Now, with regard to the loss or destruction of the papers, Dr. Verrinder says that he was making changes in his office and destroyed a lot of papers which he regarded as of no further use, and he thinks the papers in question were among them, but is not certain. At all events, he was unable to find them when they were required for production. The learned trial Judge accepts that explanation, and I am unable to say that he was wrong. It is true that these papers were destroyed (I do not think they were lost) after the action was commenced, and before the time authorised by a resolution of the college for the destruction of such papers; but, as against this suspicious circumstance, it appears that up to that time the defendants had received no intimation that discovery of them would be required. The plaintiff had already applied for and obtained discovery of the books of the college, and the examination papers of the plaintiff, and that circumstance may very well have led Dr. Verrinder to take less care of what he did with the papers in question than he otherwise might. But, even if it be assumed that Dr. Verrinder destroyed these papers for the very purpose of preventing discovery of them, yet it



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appears from the evidence that the other defendants had no knowledge whatever of such destruction. Hence their destruction in no way implies the conspiracy alleged.

Then, with regard to the under-marking of the plaintiff's papers. The evidence is, that each examiner acted independently and without reference to the others; hence the only inference to be drawn from the difference between their marking and that of the plaintiff's witnesses is the very natural one of difference of standard, of judgment, or skill. I doubt if two examiners acting independently would ever arrive at the same result in a series of examination papers. It may be that the college examiners' results fail to do entire justice to the plaintiff. I am inclined to think they do not. On the other hand, it may be that the plaintiff's witnesses do him more than justice. In the circumstances, it would clearly be improper to infer the fraudulent conspiracy which the plaintiff alleges.

It was conceded that, even if we came to the conclusion, which I should be inclined to, that on a proper marking of the plaintiff's papers he was entitled to admission, we have no power to order the college to admit him. It is to be regretted that the examiners, when they found that the plaintiff had come so near to obtaining the required number of marks, did not review his papers. The duties imposed on them under the Dental Act are such as admit of no want of conscientious care in their discharge; and the fact that, as members of a calling, they have it in their power to keep others out of that calling, ought to make them doubly careful to avoid even the appearance of unfairness or selfishness.

I would dismiss the appeal.

IRVING, J.A.:—The statement of claim, delivered on the 17th January, 1910, alleges that the plaintiff presented himself before the examining Board of the Dental College, but was refused admission by the said defendants to the college, and that this refusal was not the result of faulty answers to the questions put to him.

By the 7th paragraph it is alleged " that the defendants and each of them wilfully and fraudulently conspired together to prevent him, the said plaintiff, from entering the said college, by refusing to give him the full number of marks to which he was properly entitled in such examination by virtue of the answers made by him to the questions

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put at such examination." By the 8th, "that the defendants and each of them have subsequently refused to give to the plaintiff any information whatsoever concerning the said examination, either as to the number of marks he obtained, the subjects, if any, in which he failed, or the method upon which marks in the said examination were allotted to each candidate, and the plaintiff will say that by his answers to said questions he was entitled to enter said college, but that the defendants and each of them either marked or caused to be marked his papers incorrectly or not at all, and this for the purpose, well known to each of them, of fraudulently preventing him from entering said college."

The plaintiff claims discovery of all matters and proceeding of the said council with reference to his aforesaid examination; discovery of the questions put therein and his answers thereto and the report of the examiners thereon; damages.

On the 31st January, 1910, the plaintiff gave to the defendants a notice to produce "all . . . reports, documents, questions and answers, relating in any respect to the examination, relating to the matters in question in this action."

It is contended for the plaintiff that this notice called upon the defendants to produce the answers of the other candidates, as well as those of the plaintiff. There are cases, Jacob v. Lee, 2 M. & R. 33, Rogers v. Custance, 2 M. & R. 179, Morris v. Hansen, 2 M. & R. 392, where notices have been held to embrace any document reasonably included in the description.

On the other hand, the following notices have been held too vague: "All the plaintiffs' books of account containing entries of dealings between them and the defendant for September, 1896, and also all letters written by the defendant or any other person to the plaintiffs relating to relevant matters."

"Letters and copies of letters, also all books relating to this cause" (Jones v. Edwards (1825), M'Cle. & Yo. 139); "All letters, papers, and documents touching or concerning the bill of exchange mentioned in the declaration and the debt sought to be recovered" (France v. Lucy (1825), Ry. & M. 341):" Halsbury's Laws of Eng., vol. 13, p. 522.

It seems to me that, if we test the question whether or not this notice to produce would include the answers of other

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candidates, we should do so by the practice in making an affidavit of documents. Had the defendants been called upon to make an affidavit of documents, in my opinion they might properly omit all mention of the answers of the other candidates, because of the language used in the prayer for relief.

On this ground, I would say that the plaintiff's contention that the defendants ought to have produced the answers of the other candidates is not well-founded.

The plaintiff's advisers seem at that time to have taken the same view, because on the 21st February, after Verrinder had refused to produce any papers, the plaintiff took out a summons to compel Verrinder to produce all documents and examination questions and answers of the plaintiff relative in any respect to the examination held, etc.

These answers by the plaintiff were produced on the 10th or 11th March, 1910. Dr. Verrinder was examined on the 13th April, and it was not until that date that the plaintiff's advisers thought that it would be necessary to have the answers of the other candidates produced for the purpose of comparison.

The case came on for trial before Gregory, J., and a jury; but, as the learned Judge came to the conclusion that there was no evidence of conspiracy to go to the jury, he dismissed the action.

On the appeal before this Court, it was urged that the destruction of the answers of the other candidates, which occurred in or about March, 1910, was strong evidence against the defendants; and that spoliation, together with the testimony of an expert produced at the trial, shewing that the plaintiff was entitled to more marks than had been awarded him by the examiners, constituted a case sufficiently strong to go to the jury.

The whole of the case—if case there was—depended upon the application of the maxim contra spoliatorem to the witness Verrinder, on account of his having destroyed the answers of the other candidates before the expiration of twelve months, the period fixed by resolution of the council for their preservation.

It was argued that he had notice that they would be required at the trial. His explanation is, that they were destroyed without his knowledge in March; that is, before

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the examination of the 13th April, when their importance to the plaintiff was not appreciated.

Mr. Taylor's argument was, that it was for the jury to pass on the destruction of these papers, under all the circumstances; and, with the evidence of the expert as to the sufficient number of marks obtained by the plaintiff to qualify, a case of conspiracy was made out.

The action, it should be remembered, being one for damages, and not for the issuing of a diploma or other certificate, is based on the conspiracy of the defendants: Savile v. Roberts (1698), 1 Ld. Raym. 374. There must be proved a "breathing together," as Sir Matthew Begbie used to say—that is, a communication of intention, and the assent of each conspirator to the wish or intent and plan of the other, which constitues a common purpose, and which cannot be formed without some external manifestation of the intent or purpose of each conspirator.

Evidence in conspiracy cases is, as a rule, difficult to handle. I speak of the proof of the conspiracy or agreement. The rules of evidence require the existence of the conspiracy to be proved, before evidence can be given of acts done or words spoken behind the back of the person against whom the evidence is tendered: Regina v. Blake, 6 Q. B. 137. When it has been established that two or more persons have so combined, the acts and words of one of them in furtherance of their common purpose is admissible as evidence against the others, whether they were or were not present when the act was done or the words spoken: Rex v. Lord Preston (1691), 12 St. Tri. 645; Rex v. Hardy, 24 St. Tri. 451; Rex v. Hardwick, 11 East 585; Dickinson v. Valpy, 10 B. & C. 128.

The difficulty of giving complete proof of the conspiracy before the evidence of words spoken and acts done are allowed to become applicable to the individuals, is got over in practice by the Judge receiving that which is evidence against one provisionally, and then, at the close of the plaintiff's case, ruling how much of the evidence may be considered by the jury with reference to each conspirator or tortfeasor.

Now, if we sum up the evidence against each one of these defendants individually, the plaintiff's case vanishes into thin air. That each examiner in allowing marks to the plaintiff has reached a different total from the result

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arrived at by the plaintiff's witnesses is nothing; and because they all four have reached this conclusion, is there anything remarkable about that? It is not unusual to find that men have been plucked in several papers.

As I have before remarked, the whole case is made to hinge on the destruction of the answers of the other candidates, and Dr. Verrinder's explanation has been given as to that on discovery. On the trial, his examination as to how this happened was put in by the plaintiff as part of his case, and there is no contradiction of it.

I shall only refer to one case, Sweeney v. Coote, [1907] A. C. 221, and that only for shewing what evidence is necessary. At p. 222, the Lord Chancellor says: "It is an action for conspiracy, and no other ground is relied upon. In such a proceeding it is necessary for the plaintiff to prove a design, common to the defendant and to others, to damage the plaintiff, without just cause or excuse. That, at all events, it is necessary to prove. Now, a conclusion of that kind is not to be arrived at by a light conjecture; it must be plainly established. It may, like other conclusions, be established as a matter of inference from proved facts, but the point is not whether you can draw that particular inference, but whether the facts are such that they cannot fairly admit of any other inference being drawn from them."

I agree that the action should be dismissed, on the ground stated by the learned trial Judge. The jury, if they found, from the destruction of these papers, that Verrinder had wilfully destroyed them, under the circumstances, would be doing violence to every principle of justice. It is well to remember that the presumption of innocence is not applicable only to persons placed on trial as criminals, but also to officials or persons in the discharge of their civil duties and rights.

I would dismiss the appeal.

GALLIHER, J.A., concurred.

*Appeal dismissed.*

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## BRITISH COLUMBIA.

APRIL 1ST, 1912.

COURT OF APPEAL.

# STEVENSON v. SANDERS.

*Vendor and Purchaser—Contract for Sale of Land—Misrepresentation as to Value—Rescission—Offer to Return Money—Refusal — Acceptance after Learning Facts—Estoppel—Principal and Agent.*

The plaintiff, desiring to purchase land, went to the defendant's office, supposing the defendant to be a real estate broker, and mentioned what he wished. The defendant advised the plaintiff to buy a particular lot for $2,500, telling him that it was good value. The plaintiff, later on the same day, told the defendant that he would take the lot if the defendant could get it for him. The plaintiff then paid the defendant $50 on account of the purchase-money, and arranged to pay a further sum, amounting with the $50 to one-third of the purchase-money ($2,500) within a few days. After this, the defendant went to the owner of the lot and bought it in his own name for $2,000, less a commission of $100. A few days thereafter, and after one-third of the $2,500 had been paid by the plaintiff, the plaintiff complained to the defendant that the defendant had sold his own property, and that he (the plaintiff) had not so understood the transaction. The defendant said that, if the plaintiff had been under a misapprehension, he could have his money back; but this the plaintiff did not then accept. Two days later, having in the meantime ascertained the facts, the plaintiff wrote to the defendant that he would accept the offer; but the defendant then declined. The plaintiff brought this action to recover the profit made by the defendant or to rescind the agreement and for a return of the moneys paid:—

*Held* (IRVING, J.A., dissenting), that the plaintiff was entitled to have the agreement rescinded and the money paid by him returned.

Judgment of GREGORY, J., reversed.

*Per* MACDONALD, C.J.A.:—The plaintiff relied on the defendant's integrity, as the defendant knew, and the plaintiff, at the time the agreement was made, believed the defendant's representation as to value to be true. The plaintiff, having elected to take back his purchase-money, was entitled to that relief. He was not precluded because he did not at first accept the offer to return the money. A party is not estopped because he does not repudiate fraud before he discovers it.

*Per* IRVING, J.A.:—The defendant was not the plaintiff's agent; and no ground for relief was shewn.

Appeal by the plaintiff from the judgment of GREGORY, J., dismissing an action for recovery of the amount of profit made by the defendant upon a sale of land to the plaintiff, or to set aside the sale.

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The appeal was heard by MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

W. J. Taylor, K.C., for the plaintiff.

M. B. Jackson, for the defendant.

MACDONALD, C.J.A.:—The defendant was, at the time of the sale in question in this action, a real estate broker, although in his defence he denied that he was such. His sign was that of a person engaged in the real estate business; and, as he himself says, "The principal part of my business in any sale on commission is the re-sale of something I have already sold to a man, and he comes to me and asks me to find a buyer for him again." And again: "Q. Have you ever recommended persons to buy property and handled the transaction for purchase and possibly the sale? A. I may have done, I cannot tell you." But, in any case, it is perfectly clear that, when the plaintiff went to his office, he understood him to be a real estate broker, and that the defendant's conversation and conduct was calculated to confirm that understanding.

The plaintiff was a new-comer in Victoria, and unacquainted with the real estate market, and this he explained to the defendant. The defendant says: "We discussed things generally. In the course of the discussion I mentioned to him (plaintiff) this particular corner of Bay and Cook. I told him why, in my opinion, it was likely to have a good increase in value." And again: "Q. Do you remember telling him it was safe for him to take it, you would buy it yourself at that figure ($2,500)? A. Yes, that is perfectly correct."

The plaintiff then went to lunch, and, returning about an hour later, said he would take the lot if the defendant could get it for him. A deposit of $50 was then paid on account of the purchase-money, and it was arranged that a further sum, amounting in all to one-third of the purchase-money, should be paid in a few days.

After making the sale at $2,500, and after receipt of this deposit, the defendant went to the owner of the property, and purchased it in his own name for $2,000, less $100 allowed to him by the owner as commission, being the usual 5 per cent. In this way the defendant made, unknown to the plaintiff, a profit of $500, besides his commission, on a lot which, he had represented to the plaintiff, was good value,

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and which he (the defendant) himself would be willing to buy at that price, knowing as he did that the plaintiff was relying entirely on his integrity in the transaction.

A few days thereafter, and after the one-third of the purchase-money had been paid, the plaintiff called on the defendant and said that he had learned that the defendant had sold him his own property, and complained that he had at the time of the purchase not so understood the transaction. The defendant admitted this, but led the plaintiff to believe that he had owned it previous to selling it to the plaintiff; but the defendant said, "If you have been under a misapprehension, you can have your money back." The evidence is not very definite as to how this interview ended. It appears, however, that the plaintiff was not willing at that time to accept his money back, owing to a question of commission, and there was a suggestion by one Sherwood, an acquaintance of the plaintiff, and a sub-agent of the defendant, that the plaintiff should think it over for a few days. This interview occurred on the 28th of the month. On the 30th, the plaintiff went to see the lot, and, seeing the sign boards of other agents upon it, went to one of these and asked the price. This agent told him that he had sold it only a few days previously to the defendant, Sanders, at a price which the plaintiff understood to be $1,400. He then wrote a letter, dated on that day, to the defendant, referring to the defendant's offer to give him his money back, and saying that he could not help thinking that he had paid an excessive price, and, therefore, would accept the offer to have his money back. On the 1st April, the defendant wrote declining to pay back the money.

The plaintiff then brought the action, claiming to recover from the defendant the difference between the price the defendant had paid for the property and the price which the plaintiff had agreed to pay, and in the alternative to set aside the agreement, and for the return of all moneys paid by the plaintiff in respect thereof, together with interest thereon. The learned trial Judge dismissed the action, and from that judgment the plaintiff appealed to this Court.

I think the appeal should be allowed. On the 28th, when the plaintiff neglected to accept the defendant's offer to pay back his money, the plaintiff was not acquainted with all the circumstances of the case; while he then knew that the defendant was the owner, he did not know that the

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defendant had, after receiving his deposit, gone out and purchased it at a much lower price than he had advised the plaintiff to pay for it; he had not ascertained this until the 30th. When he did ascertain it, he then promptly demanded back his purchase-money. Had he then demanded the difference between the price paid by the defendant and the price charged him, he would have been entitled to succeed on his principal claim; but, with a full knowledge of the facts, then for the first time in his possession, he elected to take back his purchase-money; and that is the relief to which he is entitled. I am unable to agree that the plaintiff is precluded from claiming relief now, because he did not on the 28th accept the offer of the return of his money. He then knew nothing of the defendant's secret profit of $500, nor of the underhand and deceitful manner in which it had been obtained. A party is not estopped because he does not repudiate fraud before he discovers it.

I would, therefore, direct that judgment be entered in the Court below for the amount of the plaintiff's alternative claim. He should have the costs of this appeal, and of the action.

GALLIHER, J.A., concurred.

IRVING, J.A.:—The plaintiff alleges that he was induced to enter into a contract to buy a lot for $2,500, on a representation by the defendant that he would act as the plaintiff's agent, and would procure the lot for him upon the most favourable terms, and he charges that the defendant, in violation of his duty, bought the lot for himself at $2,000, and was selling it to him (the plaintiff) for $2,500.

He claims payment of the difference between $2,000 and $2,500, or, in the alternative, that the agreement into which he entered with the defendant be set aside, and the moneys paid by him thereunder be returned to him.

The learned trial Judge, after hearing the plaintiff, came to the conclusion that there was no evidence to support the contention that the defendant had agreed to act as the plaintiff's agent.

The appeal is against that holding.

The evidence shews that the plaintiff, with a Mr. Sherwood, called on the defendant and discussed the question of the plaintiff buying some real estate in Victoria. The

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defendant pointed out what he considered would be a good point at which the plaintiff could buy; he said he would not advise the plaintiff to buy anything that he himself would not buy. A particular lot was mentioned, and the defendant said the price was $2,500. The plaintiff says: "I do not think the defendant said he would go and buy it for him; nor did he say he owned it. He just recommended it."

The defendant says the word "commission" was not mentioned between them; but the plaintiff says, "I naturally thought he was selling on commission."

The plaintiff and Mr. Sherwood went to lunch, and afterwards the plaintiff returned to the defendant's office and said: "I will take that lot. I will pay $50 down and pay the balance in a few days."

The defendant then wrote and signed a receipt—unfortunately this has been lost or it might on its face shew what the true relation was. The plaintiff paid the balance of the first instalment of $833.33, and received from the defendant an agreement for sale, in which the defendant agreed to sell him lot 15.

The plaintiff, having heard from his friends that the price at which he had bought was too high, went to the defendant. The plaintiff and defendant give very much the same accounts as to what took place at that interview. The defendant says: "Captain Stevenson told me that he thought I had acted as a broker, and not as a principal in the transaction." The plaintiff says: "I told Mr. Sanders that I thought I had paid too much, and that I was not satisfied, and that I thought he was acting as agent and not as principal." The defendant then said he was not acting as agent, and was not carrying on business on a commission basis, and that if he (plaintiff) was not satisfied with the transaction he could have his money back. The plaintiff declined this offer, and went away.

At that time there can be no doubt that he knew that the defendant was not acting as his agent, but was selling his own land. Two days later, i.e., on the 30th March, the plaintiff wrote that he still felt that he had paid too much for the lot, and that he would now be glad to have his money back; but the defendant said that the matter could not be re-opened now. In this letter he pointed out that the reason he had made the offer to cancel was because the plain-

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tiff seemed to be under the mistaken impression that he was acting as a broker, whereas he was the vendor, and was paying Sherwood a commission upon the sale.

It is a curious thing that the point that the plaintiff now seeks to make against the defendant, viz., that he was the plaintiff's agent, was not advanced in the letter of the 30th March. The explanation of this is, that the plaintiff's chief grievance was, that the defendant had bought the property for $1,400, and was selling it to him at $2,500. In this he was mistaken; as a matter of fact the defendant had bought it at $2,000.

The plaintiff says he thought the defendant was to act as his agent, but that he (the defendant) was to get his commission from the vendors; nevertheless—and this seems to me somewhat inconsistent—he thought his friend Mr. Sherwood was entitled to receive from Sanders one-half the commission he was to receive from the other side, because he (Sherwood) had introduced him to the defendant.

It is owing to the intervention of Mr. Sherwood that the mistake has arisen.

The plaintiff entered the defendant's office with a preconceived idea that he could secure the defendant's services, advice, and assistance, and that the defendant should obtain his reward for these services by taking a commission from the vendor.

The defendant, on the other hand, thought the plaintiff came to buy land from him, and his evidence and conduct is consistent with that view throughout. When he discovered the plaintiff's mistaken idea, he did, in my opinion, all that could be expected from him—he offered to restore things to their original position; but the plaintiff said, in effect: "No: knowing the mistake I was under, I will now affirm the contract."

I think there was some carelessness on the part of the plaintiff in assuming that the defendant would give him the benefit of his services and advice, and look to the vendor for his reward. Perhaps carelessness is too strong a word, but it was the plaintiff's loose way of taking too much for granted. An agent may get his remuneration from the other side, as in Lowenberg Harris & Co. v. Wolley, 25 S. C. R. 51; but that was a very different sort of agency.

I do not think there is any evidence of fraud or misconduct on the part of Sanders. If Sanders had been em-

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ployed to buy, it would have been a fraud on his part to have sold his own property to the plaintiff, who was under the belief that he was dealing with a third party: see Brookman v. Rothschild, 3 Sim. 153, on appeal 5 Bligh N. S. 165; Gillet v. Peppercorn, 3 Beav. 78; and Kimber v. Barker, L. R. 8 Ch. 56. Now, we should not lightly reach the conclusion that a man has been guilty of a dishonourable act. If we start the consideration of the testimony with this presumption in mind, a variance in testimony is more readily attributed to misconception of the facts by an innocent witness than to wilful and corrupt misrepresentations. In estimating the probability of mistake and error, and also in deciding on which side the mistake lies, much must depend on the natural talents of the adverse witnesses, their quickness of perception, strength of memory, their previous habits of general attention, or of attention to particular subject-matters.

Assuming that this was a case of mistake—as I believe it was—there was no true contract of agency (or of sale) between them. The plaintiff then might recover back his money on common law principles: Kelly v. Solari, 9 M. & W. 58; or he might apply in equity to get the contract set aside and to be freed from his liabilities, as in Paget v. Marshall, 28 Ch. D. 255.

The plaintiff declined both these remedies, when the defendant said he might have them; but, later on, elected to pursue a remedy, viz., to have the property at the price paid for it, a remedy which he would undoubtedly be entitled to if the agency were established. As he has failed to establish that relationship, his action fails.

The plaintiff's counsel on the appeal abandoned that portion of the prayer for relief which asked to set aside the contract.

It appears that the defendant did not acquire his title to the property, until after he had received from the plaintiff the deposit of $50. Much was made of this—and, if the relationship of principal and agent existed, it would be a very serious thing; but, as that relationship did not exist, there was no harm in it. A man may undertake to sell property he does not own. He does so at his own risk: but, if he secures a title to the property before the purchaser rescinds, the latter has no ground of complaint.

*Appeal allowed;* IRVING, J.A., *dissenting.*

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## BRITISH COLUMBIA.

APRIL 1ST, 1912.

COURT OF APPEAL.

## DERBY v. ELLISON.

*Fire—Setting out — Injury by Spread—Negligence of Servants — Responsibility of Master — Bush Fires Act—Failure to Shew that Lands in Fire District—Pleading —Admission — County Court Practice — Liability at Common Law—Unlawful Act—Authority of Master.*

*Held*, affirming the judgment of SWANSON, Co.C.J., 18 W. L. R. 268, that the defendant was responsible for the act of his servants in setting out fire which spread to the plaintiff's land and destroyed his property—the act being for the benefit of the defendant.

The plaintiff alleged in his plaint in a County Court that his land and that of the defendant were within a fire district, but gave no proof of it:—

*Held, per* GALLIHER, J.A., that, under the County Court Rules and practice, the allegation was not to be taken to be admitted because the defendant did not deny it. There is no Rule in the County Court Rules corresponding to Marginal Rule 209 of the Supreme Court Rules; and sec. 77 of the County Court Act does not make that Rule applicable, the matter being specifically provided for by the County Court Rules; or, if not, the Supreme Court Rule was not applied by the County Court Judge, whose discretion was final.

Appeal by the defendant from the judgment of SWANSON, Co.C.J., 18 W. L. R. 268.

The appeal was heard by MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

W. J. Taylor, K.C., for the defendant.

Macintyre, for the plaintiff.

IRVING, J.A.:—The argument for the defendant was based on the admission that the fire (if lighted by the defendant's servants) was an illegal act, and, therefore, on the principle of Poulton v. London and South Western R. W. Co., L. R. 2 Q. B. 540, the defendant could not be responsible. The limitation on the principal's authority in that case turned on the fact that the act done was ultra vires of the company. The judgment of the majority of the Court in Mill v. Hawkes, L. R. 9 Eq. at p. 317, establishes this distinction.

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Dyer v. Munday, [1895] 1 Q. B. 742, shews
cipal may be liable for the act of his servant,
act complained of is a criminal offence.

The evidence of the violence of the wind
factory. That there would be a great deal of
conceded; but, on the other hand, there is evid
wind was not great. I am not satisfied that t
terrible wind that the defendant's witnesses w
believe. As to what constitutes a storm so as to
the doctrine of vis major, see Garfield v. City
22 A. R. 128.

This is an action for tort; and in such a ca
tiff has to prove that the act of setting fire
was within the scope of the servants' duty.
has been proved. Clearing is incidental to the
cabin. By legal intendment, the act was done
fendant's benefit, because it is presumed that th
intention in employing these men to erect the c
incidental thereto to clear the site, was to bene

I would dismiss the appeal.

GALLIHER, J.A.:—The plaintiff at the trial
plaint by adding a clause that the lands of the
defendant were within a fire district, but ga
of this.

The appellant contends that, as this was n
the defendant, it must be taken to be admitted,
proof is necessary. That would undoubtedly b
action was in the Supreme Court: see Supreme
B.C., Marginal Rule 209. There is no such
County Court Rules; and, unless it is covered b
the County Courts Act, 1905, that contention c
Section 77 reads as follows: "As to any matter
or procedure (including costs) not specifical
for by this Act or the Rules of Court, the Rule
and practice of the Supreme Court from time
force shall apply, so far as, and in the opinion o
the same shall be applicable, and the exercise of
discretion hereunder shall be final and without

I am of opinion that sec. 77 does not apply
the County Court Rules themselves the methods
and procedure are very clearly laid down; but,
error in that view, sec. 77 only applies when, in

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of the Judge, the Supreme Court Rules are applicable, and the exercise of the Judge's discretion is final. It does not appear on the proceedings that the point was taken at the trial, or that he exercised his discretion, and if it is to be taken that he exercised his discretion at all, it was against the appellant's present contention, for we find that twice in the written judgment delivered the Judge holds that the defendant appellant fails in his contention that it was an unlawful act, as no proof was given that the lands were within a fire district.

It then became a question of recovery at common law.

The learned trial Judge has found that the defendant's servants set out the fire which caused the damage, and that they used no reasonable means to prevent it from spreading to other lands; and, on the evidence, I am unable to say he was wrong. He also finds that the defendant is not protected on the ground of vis major; and with that I agree.

The evidence is, that the servants were forbidden by the defendant to set out fires; but this fact, under the authorities, does not free the defendant from liability if the act of the servant was within the scope of his employment and in the interest of the master.

It is admitted by the defendant's witnesses that they were employed to build fences, keep cattle off the premises, dig a well, and build a cabin; and the defendant himself says that, a short time previous to the occurrence of the fire, he, in company with one of his servants, Blondin, attempted to clear a site for the cabin by lighting some brushwood, but that it was too wet and the fire did not burn, so he abandoned that site.

The clearing of a site by fire or otherwise would be incidental to the building of a cabin, and work within the scope of the servant's employment, and something in the interest of the master. It was no part of the work for which the servants were engaged to clear the land other than such as might be necessary for a site for the cabin to be built, and in fact they say they were not employed to clear land.

As the servants in this case deny the setting out of the fire at all, it would, of course, be impossible to elicit in cross-examination for what purpose it was done, which could have been done if the setting out of the fire had been admitted. The trial Judge having found that they did set out the fire, we are driven to one of two conclusions, either that

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they did it for the purpose of clearing a site for the cabin, or that they did it wantonly and for no reason or purpose. Considering that one of the purposes for which they were employed was the building of a cabin, and incidental to that was the clearing of a site, and the plaintiff having proved the setting out of the fire and the nature of the employment, I think the reasonable inference to draw from the facts is, that it was set out for that purpose, and not simply as a wanton, causeless act of the servants.

I would dismiss the appeal with costs.

MACDONALD, C.J.A., concurred.

*Appeal dismissed with costs.*

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## BRITISH COLUMBIA.

APRIL 1ST, 1912.

COURT OF APPEAL.

## FORMAN v. RYAN.

*Will — Action to Establish — Evidence — Testamentary Capacity—Undue Influence — Finding of Trial Judge Reversed on Appeal.*

The judgment of CLEMENT, J., 19 W. L. R. 212, was reversed upon the facts, and the will in question was declared not to be void for want of testamentary capacity or by reason of undue influence; and the will was ordered to be admitted to probate.

Appeal by the plaintiff from the judgment of CLEMENT, J., 19 W. L. R. 212.

The appeal was heard by MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Bodwell, K.C., for the plaintiff.

A. E. McPhillips, K.C., and A. D. Crease, for the defendants.



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MACDONALD, C.J.A.:—This action was brought to propound an alleged will made by James Boyd, who died in April, 1910, at the age of about eighty years, leaving an estate then valued at about $16,000. Probate was resisted on two grounds, that the testator lacked mental capacity to make the will, and that the will was obtained by undue influence by the principal beneficiary, Mrs. Cook. There is, to my mind, no evidence at all of undue influence. The real issue, therefore, in this appeal is as to the mental condition of the deceased at the time he made the will in September, 1909. The learned Judge gave very careful attention to the case, and came to a conclusion against the soundness of mind of the testator. As I have come to a contrary conclusion, I feel I ought to state my reasons. As the evidence is very voluminous, I shall not attempt to do more than refer to what I regard as the most salient facts.

The case is somewhat complicated by proceedings taken in lunacy in January, 1910. Two of the most important witnesses in support of the will were Dr. Nelson, who was the medical attendant of the testator for at least a year before his death, saw him very frequently indeed, and gave evidence at the trial that the deceased was sound in mind up to at least December, 1909, three months after the making of the will, and the executor thereof, James Forman, who was his financial agent, who drew the will, and was, therefore, able to speak of the testator's condition at the time of its execution. These witnesses made affidavits in the lunacy proceedings, which are to some extent at least in conflict with their evidence at the trial. It, therefore, becomes necessary to consider under what circumstances the evidence was given in each case. The lunacy proceedings were referred to during the argument as "a friendly conspiracy," and I am inclined to think that that term very aptly describes them. It may be useful to state briefly how matters stood when these proceedings were commenced.

Witnesses on both sides agree that James Boyd was always miserly and penurious, and, as one witness described him, "cantankerous." Up to July, 1908, it is not disputed that he was of unsound mind. Ledingham, one of the witnesses against the will, says that it was in July of that year that he noticed a change in him, physically and mentally. The illness of 1905, referred to by the learned Judge, left the deceased physically more feeble and less active, par-

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ticularly on his feet, than he had been before, but he was able to take care of himself, living alone, as he was, and preparing his own meals, until August, 1908, when he requested Mrs. Ledingham, a next door neighbour, to bring him his meals. In November of that year, he had another illness, and Dr. Nelson was called in to attend him. The principal trouble was dysentry and a hernia, and the doctor thought that he was threatened with paralysis. It was about this time that the beneficiary under his will, Mrs. Cook, first took charge of him. It was she who called in Dr. Nelson, and attended to his wants until he had somewhat recovered from the severity of his disorder in February, 1909. In the latter month, Boyd went to live with an old friend, James Smith, no relative of the family or connection of the defendants Smith. Boyd remained at Smith's house until about the 20th March, when he quarrelled with Smith, apparently because the Smiths had been persistently urging him to make a will, in which, I infer, they expected to be beneficiaries. He was from their house taken to St. Joseph's Hospital, but either would not stay there, or the hospital authorities would not keep him. I infer that he made it so unpleasant, and it was so apparent that he was not an hospital patient in the ordinary sense, that he was sent away. He was then induced to enter the Old Men's Home, but, becoming displeased with the manner in which he was treated, he was sent away. The superintendent of the institution, very harshly, as it seems to me, sent him to the police station to get rid of him. He was then taken home, and Mrs. Cook undertook the care of him from that time until November, when she herself was taken ill. During this period between March and November, 1909, Mrs. Cook attended him daily at his own house, and saw that his wants were supplied; and during that time, while receiving proper care and nourishment, he appears to have been in about the condition of mind one would expect in a man of his age and feeble physical health. He could go about with Mrs. Cook, call on neighbours, chat with friends, and talk intelligently about municipal politics, in which he had always been very much interested.

The period of time with which I am principally concerned is, therefore, from July, 1908, to Boyd's death in April, 1910. In the beginning of 1909, Boyd sent for R. T. Elliott, K.C., for the purpose of discussing with him his

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worldly affairs. Mr. Elliott had known Boyd about ten years previously, but had forgotten him. Boyd, however, remembered Mr. Elliott, and remarked upon the fact that he had grown stouter since he had previously known him. At that time, Boyd was ill, but Dr. Nelson says his mind was quite sound. Mr. Elliott entered into conversation with him, and found that he wanted to be advised as to the law governing the disposition of property by will. He spoke of having relatives in Ireland, but said they were not dependent upon him. He wanted to know if he could give his property without recognising his relatives; he had some notion of giving bequests to charity, and stated that he wished to remember Mrs. Cook, who had been very kind to him, and also indicated, without mentioning any names, that he might remember the Ledinghams. Mr. Elliott found him quite intelligent, and could detect no symptoms of unsoundness of mind, although he says he relied a good deal upon the assurance of Boyd's medical attendant that he was in a fit condition mentally and physically to discuss matters of business. Prior to that time, Boyd had discussed making a will with his old friend Alexander Wilson, whose evidence I shall refer to more particularly hereafter, and asked Wilson to be his executor. Wilson says that Boyd had told him he had no relatives; in fact, had insisted on it; and it is suggested to us that this was an insane delusion. I think that is met by the evidence of Mr. Elliott and other witnesses, which shews that he was under no delusion at all with regard to his relatives, but simply wished to put them aside. Mr. Elliott was not asked then to prepare a will, but, in April, Boyd went to his office for the purpose of having his will made. He said to Mr. Elliott that he had come to see him again about the will, and wanted him to write it. Of this occasion, Mr Elliott said in evidence: "He kept strictly to the matter in hand from the talk I had at the house. He did not vary a hair's breadth. Of course, he was sick and an old man, but he saw what he wanted to do with his property." On Boyd's instructions, Mr. Elliott drew his will, giving all he had to Mrs. Cook. After it was read over to him, he said he would like to take it away and give it further consideration, which he did. This will was never executed.

I would like to remark here that a good deal of argument was directed to the lack of discussion between Boyd

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and Mr. Elliott on this occasion with regard to how he should dispose of his property. It seems to me that that circumstance was not at all significant, bearing in mind the previous interview and discussion. It was in April that this will was drawn by Mr. Elliott, and nothing more was done by Boyd until September, when he went to Mr. Forman, whose firm had attended to Boyd's business for a number of years, to have his will made. Mr. Forman questioned him as to what he wished to do with his property, and to whom he wished to leave it. Boyd mentioned Mrs. Cook. He was asked if he had any relatives, and he said that his relatives were nothing to him. He mentioned his sister. Mr. Forman asked him if he would like to leave something to her, and he "agreed" to leave her $1,000. The will was not drawn on that day, Boyd saying he was not ready to sign it, but would come back the next day. He came back, and Mr. Forman says he further pursued the conversation with him of the day before, and asked him further if he did not want to leave something to charity. He does not remember his answer, but says he agreed to leave something to the Protestant Orphans' Home and the Jubilee Hospital. When asked if Boyd himself named these charities, Mr. Forman said: "I do know that he mentioned the orphanage in connection with the late Mr. Taylor, apparently a friend of his;" and it was Boyd himself who named the sum he would give to his sister.

Mr. Forman had known Boyd for years, and he says he was not, at the time of the execution of the will, mentally different from what he had ever been; he was very feeble physically, more feeble than usual. Before executing the will, Boyd went to the two banks in which his moneys were deposited to ascertain the balance at his credit, and after its execution, but on Forman's suggestion, deposited the will with one of his bankers, telling him what it was and to take good care of it. There is no question about all this, because the bank manager and clerks who gave him the information were called.

There is considerable other evidence of independent persons having no interest in the result to shew that he was quite capable of recognising and talking sensibly with his friends. In one case, that of Cameron, whom he had not seen for a number of years, in fact since he was a boy, and who had been in the Yukon for several years, when told who

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he was, Boyd recollected circumstances of the man's youth, clearly and distinctly, spoke of his father, and inquired how he was getting on in the north.

Some stress was laid upon the fact that small cheques sent to Boyd by Mr. Forman for rents in the early part of 1909, had not been deposited by him, but kept in his possession, and that, upon Forman calling his attention to the fact, all cheques were given back to Forman, and an arrangement made that cheques should not be sent thereafter, and that Boyd should get money from Forman when he wanted it. This was relied upon as evidence that he was unable to transact his business and look after his property; but, when his physical condition is remembered, I do not see that that circumstance is of much importance. A man in his condition could not safely go about the down town streets.

About the end of November, 1909, Mrs. Cook became so ill as to be unable to attend to Boyd, and Dr. Nelson procured a male nurse, Orton. Boyd soon quarrelled with him, and accused him of ill-treating him. While I do not wish to reflect unduly upon Orton, I think there is some evidence, even in Orton's own testimony, that he used him harshly, and without that gentleness and consideration that the age and feebleness of Boyd required of him. At this time Dr. Nelson and Mr. Forman were in a quandary to know what to do. Neither the hospital nor the Old Mens' Home, a home for destitute old men, was a suitable place for him. He objected to Orton being in his house to take care of him; and, as it was apparent that he was nearing his end, something had to be done so that his money could be legally expended for his care, and the expedient was adopted of taking proceedings in lunacy to have a guardian appointed. I, therefore, come back to the conflict which I have mentioned in the beginning between the statements made in the affidavits in lunacy and at the trial by Dr. Nelson and Mr. Forman. The only statement I think it necessary to refer to in the affidavits of Nelson and Forman is, that Boyd "has been for some months past feeble both in mind and body and is afflicted with senile dementia, which is gradually becoming more acute." In these proceedings Boyd was examined by two other physicians—Fraser and Hall—who both state that Boyd was then (in the month of January, 1910), suffering from senile dementia. The examinations made by them

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were, I think, somewhat perfunctory. Neither of them was able to remember at the trial what questions he asked and what answers he received; but they concluded that the man was in the condition I have mentioned. Dr. Hall expressed at the trial no settled opinion as to whether or not the disease existed in September. Dr. Fraser was of the opinion that it had existed for some time, but he fixed no time; he says that it was a progressive disease, and that he thought Boyd was in the intermediate stage in January. Neither of these witnesses is a specialist in mental diseases. Their evidence is of no great assistance otherwise than as shewing that senile dementia was present in January, 1910. Senile dementia is an incurable disease, we are told, and its duration is different in different patients. Had Boyd died of this disease, perhaps it could be assumed that its duration in his case was longer than from December to April; but he died of progressive paralysis and old age; and, while senile dementia may also have been present and contributed to death, still there is nothing shewn in evidence which entitles me to say that the deceased had any mental disease prior to December. Dr. Nelson was confronted at the trial with his affidavit affirming the statement above quoted, and containing the words "for some months past," and asked to harmonise it with his statement at the trial that there were no symptoms of senile dementia before December. I think his explanation is one which I ought to accept, bearing in mind the circumstances in which the affidavit was made. The doctor says he did not notice the significance of the phraseology, and did not intend to state that that condition existed for some months past.

As supporting the contention that the lunacy proceedings were taken for what was really an indirect purpose, I would point out that they were entirely irregular, Boyd not having been served with a copy of the petition nor examined by the Judge, as the Act requires. As between statements made in that inquiry and evidence given at the trial of this action, tested by cross-examination and founded upon most careful consideration and knowledge, I have no doubt which I ought to accept. There is no question of the competency of Dr. Nelson to speak of the condition of Boyd's mind, not only in December and January, but also for more than a year prior thereto—in fact, for the whole period during which it was contended that Boyd was wanting in testa-

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mentary capacity. Now, there is no suggestion that Dr. Nelson is not a reputable medical practitioner of good standing in the community, and the same is true in his business of Mr. Forman. Am I, therefore, to reject as not worthy of credit the well-considered evidence of these witnesses at the trial, because, carelessly or inadvertently or good-naturedly, or without thoroughly understanding the affidavits, they made statements in the lunacy proceedings somewhat inconsistent with their evidence at the trial. I think not.

The other witnesses called in support of the testator's capacity appear to me to have appreciated the obligations they were under to give evidence thoughtfully and without prejudice. Mrs. Cook's evidence impresses me most favourably, notwithstanding her very great interest in the result of the litigation.

I am unable to come to any other conclusion, on the evidence in support of the will, if believed, and it cannot be suggested that it should not be believed except as affected in Mrs. Cook and her daughter's case by self-interest, and in Mr. Forman's and Dr. Nelson's by their affidavits in the lunacy proceedings, than that the testator, though feeble in body, was of sound and disposing mind, memory, and understanding in September, when the will was made.

Turning now to the evidence given on behalf of those contesting the will. First, we have James Smith, a very old friend and acquaintance of the testator, and who was very kind to him during his illness in 1905, and again in the beginning of 1908, when he took him to his house to live. Smith says that on one occasion the deceased said, "This is my house" (referring to Smith's house). But it is manifest from Smith's own testimony that there was no insane delusion here. Then we come to the evidence of Alexander Wilson. We have here a witness who is entitled to the highest credit. A very old friend and acquaintance; a man who had no motives of self-interest to serve; and who states what took place between himself and the deceased within a year before his death in a natural and straightforward manner. He was called by the contestants, but his evidence, I think, really supports the will. He says that Boyd spoke to him on many occasions about making a will, and asked him if he would act as executor. That, he sent for him on some occasions to discuss the question of settling up his affairs before his death. Wilson considered him of

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sound mind. The only things he could speak of which might throw doubt upon that was, first, the testator's habit of putting off making his will. Wilson considered this childish, but it is a kind of childishness, if I may say so, common to many men with respect to the making of their wills. That was the only circumstance which Wilson could relate reflecting on Boyd's soundness of mind before December, 1909, with possibly this other, that Boyd, when asked about his relatives, said he had none; but I gather from Wilson's evidence that he was simply reluctant to speak about his relatives. It appears that his relatives, none of whom resided in Canada, paid little attention to him for thirty or forty years, nor until he had acquired some property. The other matter which this witness thought might indicate feebleness of mind was his denial in December that he had made a will; but this is not hard to account for. Several of his neighbours had been pestering the old man to make a will in their favour, and he might very naturally be desirous that the fact that he had made a will should not become known to them, and subject him to further persecutions. These people were the principal witnesses against the will. It is a significant fact, too, that after September, in which month the will was made, the deceased no longer continued to ask Wilson to be his executor.

Then there is the evidence of Mr. and Mrs. Ledingham. They shewed him some kindness in the way of bringing him meals when he was unable to cook his own, and I think they expected a will to be made in their favour. There is a general note of exaggeration running through their evidence, which greatly detracts, in my opinion, from its value. The incident of the fire in the mattress is a good illustration. The cross-examination of Ledinghom, I think, shews that the old man did not wish the mattress to be thrown out, because he wanted it saved. I have great difficulty in understanding the evidence regarding this fire. Ledingham speaks of two such fires, but describes only one, which, he says, was in April or May, 1909, but, when Boyd was sent to the Old Men's Home in March, 1909, we find the witness Mackintosh referring to a mattress which had been partly burned being sent with him; and Williams speaks of being at Boyd's house in the evening of the fire in the mattress, which, he says, was in the summer of 1909. But, assuming that this mattress was injured by fire earlier than April, 1909, it was

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clearly not in the hopelessly burned condition which the evidence of Ledingham would lead us to believe it was in, Boyd was physically unable to do more than look on while the mattress was being carried out, and his alleged remarks —assuming that they were made—only indicate that he was deprecating the seriousness of the danger. Ledingham, while professing to think Boyd was unfit to do business, nevertheless attempted to buy his property at a date later than the will, and, as nearly as I can make out, in December. He very naively says that he wanted to buy it, but would rather get it without buying it. Evidently this witness did not think Boyd was mentally incapable of doing business, even in December.

Shepherd's evidence, I think, needs only to be read to be rejected, and the same is true of the evidence of Mackintosh. Boyd's conduct in the police station was that of a sane old man, furiously angry at the indignity to which he had been subjected, and at the Home he resented having another person in his room. Apart from the reckless tone of Shepherd's evidence, we have the contradiction between paragraphs 1 and 2 of his affidavit made in the lunacy proceedings and his evidence at the trial. From these paragraphs I gather that, within six months of the date of the making of that affidavit, or at all events within a period of not greater than a year, he had had the conversation in the streets with Boyd mentioned in paragraph 2. He did not venture to repeat these statements at the trial; but, on the contrary, in examination in chief he stated that he had not spoken to Boyd in the streets for a year before that time, and did not want to.

Then there is the evidence of Miss Partridge. Those incidents which she relates, in a natural manner, as they occurred, without any embellishment of her own, rather confirm than otherwise the soundness of mind of the testator. For instance, his coming to her father's house early one morning for his breakfast, and saying that Mr. Grundy wanted him taken to the hospital, and his aversion to going, are quite rational. When a message came from Mrs. Cook that a carriage would be sent to take him to the hospital, he appreciated the situation thoroughly and wished to go home at once to avoid, as I think, going to the hospital, and objected to Mr. Partridge accompanying him. All this is rational, and shews a keen appreciation of his circumstances

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and memory of persons and things. The date of this is not fixed, but the weather was cold, so it must have been late in the year (1909) or beginning of 1910. And again, when Miss Partridge visited him at Mrs. Addington's shortly before his death, he recognised her and seemed quite rational, as indicated by his astute remark when she said good-bye, that it was not good-bye. This witness kept a record of Mrs. Cook's movements, which, when asked to explain, she said was "to protect myself." How she needed protection I am unable to conceive, unless, as was suggested, she expected the deceased to make a will in her or her father's favour, and anticipated that Mrs. Cook would make claim against the estate for her services. If she expected this, it had apparently not been present to her mind at that time that the testator was mentally unsound.

Macdowell's evidence is of little importance, and does not, to my mind, indicate unsoundness of mind of the testator.

Williams was, at the time of the trial, very sure that the deceased had been mentally unbalanced for at least three years before his death, which is contrary to the evidence on both sides. A story which, he says, the deceased told him, about an old friend handling his papers, is the chief factor in his behalf.

Then it is said that the will is inofficious, and this is relied upon as evidence of lack of testamentary capacity in the testator. Nothing was given to James Smith, to whom I have already referred; but Smith and the testator were not on speaking terms for a year before his death. Smith is making a claim against the estate for his services to the testator, which he values at $1,000. The Ledinghams also were not remembered in the will. They were merely neighbours, and what they did for him was under an arrangement by which they were entitled to claim for services rendered at his request. They, too, have made a claim against the estate for these services. That the testator had carefully considered the claims of his relatives in Ireland is clearly established by the evidence of Elliott and others. As they were in no way dependent upon his, and had paid him little enough attention, he apparently did not consider that they had any claims upon him. For more than a year before his death, the testator had given considerable attention to the disposition which he ought to make of his property at his

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death. It is quite apparent that he found it difficult to make up his mind. It appeared to him to be a choice between charity and those who had been most kind to him during his declining years. It is, therefore, not surprising that in September, 1909, after he had experienced what he believed to be unkindness from several of his old friends, and had for a year been carefully cared for, and his wishes understood, by a person who had shewn him the affection and kindness which Mrs. Cook undoubtedly did, he should have decided to leave his property to her. I do not attach much importance to the contention that the bequests to his sister and to the two charities were suggested by others. It is quite clear that he had considered the claims of his relatives, and had put them aside, and that he had also considered doing something for charity long before the will was made; but, assuming that he would not have made these bequests had they not been suggested to him by Forman, though I do not think such an assumption would be quite justified, still his making them only shews his willingness to receive and capability to act upon advice.

The testator was under no insane delusion, even if we believe all the evidence, apart from mere expressions of opinion given by the witnesses against the will.

Sir J. Nicholl, 3 Add. 90, gives a much-quoted definition of insanity: "Where the patient conceives something extravagant to exist which has still no existence, whatever, but in his own heated imagination, and where, at the same time, having once so conceived, he is incapable of being, or at least of being permanently, reasoned out of that conception, such a patient is said to be under a delusion."

None of the so-called delusions of Boyd were of this nature. Apart from insane delusions, there may be such weakness of intellect or mental decay as to destroy testamentary capacity; but, I think, that was not shewn to exist here—certainly not earlier than December, 1909.

I think, therefore, that the appeal should be allowed, and the will admitted to probate. As I think there was some justification furnished by the lunacy proceedings for contesting the will, all parties should have their costs of the action and of the appeal out of the estate.

IRVING, J.A.:—I do not see how the judgment can be supported.

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If we remember that the will was made on the 18th September, 1910, we have the following positive testimony that the man was perfectly sane and capable of making a will:—

1. Dr. Nelson, who had him in charge from February, 1909, and saw him frequently.

2. Mr. Elliott, who drew a will for him in April.

3. Mr. Forman, who saw him twice in September with reference to the will now in question.

4. The Rev. Mr. Grundy, who visited him daily, and who fixes the period of the change in December, 1909.

There are others—Mr. Heisterman, whose evidence shews that he paid but little attention to the man, Mr. Doig, Mr. McConcon, and Mr. McKay—who testify to the same effect; but the four I have mentioned seem to me, from their association with the deceased, the best able, with the exception of Mrs. Cook, whose evidence I leave out of the question, to testify as to the man's capacity at and before the critical time.

It must be conceded that Dr. Nelson and Mr. Forman, by their efforts in January, 1910, did much to damage the case they now support; but the evidence of Mr. Elliott and Mr. Grundy stands unattacked.

I would allow the appeal.

GALLIHER, J.A.:—I have had the opportunity of reading the judgment of my learned brother the Chief Justice, with whom I agree, and would have nothing to add, but, out of respect for the views of the learned trial Judge, with whom I differ, I wish to emphasise one or two of what appear to me salient features in the issue.

If I read the learned trial Judge's judgment aright, I think he practically found that there was no undue influence. This, however, is disputed by Mr. McPhillips, counsel for the respondent Sarah Ryan; and, as he strenuously argues that there was undue influence, I will deal with that point.

Mr. McPhillips starts out by urging upon the Court the fact that Mrs. Cook, from the moment she took charge of the deceased, did so with the set purpose of so influencing him that he would make a will in her favour, and speaks of her as a clever and designing woman, who had the deceased completely under her control; he depicts how careful she was to hide her designs from others; and cites, as an instance of

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her cleverness and cunning, that she, knowing that, if all his property were left to her, it might create suspicion, and to avoid this, and as part of a well-laid plan, suggested to the deceased that he leave some of his property to his sister.

Now, all this is very well in theory; but, unfortunately for Mr. McPhillips's contention, he introduces the evidence of a male nurse, who, during the latter period of the illness of the deceased, was in charge of him for a time. The evidence of this man is, that Mrs. Cook, when she would call to see the deceased, would throw her arms around him and kiss him, and make much of him. Now, if this evidence is to be believed, and this was the clever designing woman, alert at all times to hide from strangers the fact that she was trying to gain influence over the deceased, this act repeated time and again in the presence of a male stranger, it seems to me, would be the most foolish act she could commit.

I discard that evidence, but Mr. McPhillips maintains that it should be given full credit; and, if so, it answers his own contention.

It is admitted by all that Mrs. Cook was very kind to the deceased, and he was more amenable to her than to any of the others. This fact is urged upon us and against Mrs. Cook.

Mrs. Cook had known the deceased (who was her father's friend) since she was a child; and, when she took charge of him, she found him in a very filthy condition—due, no doubt, to illness and physical weakness.

It is noticeable that all the time she had charge of the deceased, and was able to look after him, the old man improved in health, was always kept clean, was taken out for drives and walks, and the best of care taken of him under the circumstances.

Is it unreasonable, then, that he should have been more desirous of yielding to her wishes in respect of his own convenience than to that of others; nay, is it not the most natuarl thing that he should? And yet all this is urged against Mrs. Cook.

I can only say, on this point, that, in my opinion, the evidence falls far short of proving any such contention.

It would be unfortunate, indeed, if acts of care and kindness bestowed upon those needing it should be regarded as emanating from sinister motives, unless the evidence points clearly to that.

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The only other point upon which I wish to touch, briefly, and wherein, in my opinion, lies the germ which has developed all this controversy, is that relating to the proceedings taken in lunacy. This was some months after the making of the will; and, whatever may be said as to the wisdom or otherwise of these proceedings, a full perusal of the evidence leads me to the conclusion that they were taken with the view of placing some one in authority for the purpose of providing creature comforts for the deceased; and, whether he was mentally capable at that time, he certainly was physically incapable of doing so himself.

Of course, we cannot overlook the testimony given in these proceedings—to do so might in many cases lead to very serious results—but, taking these proceedings as a basis to start from, let us carry our minds back to the occurrences adduced in evidence prior to this time, and upon which the contestants base their contention of testamentary incapacity.

My learned brother has gone very fully into these, and as I agree with him, it would be only repetition for me to go over the same ground; but I wish to point out this, that, having in mind the proceedings that had been taken, a witness going back to events that occurred previously might, in all honesty, regard those events as strange or peculiar, and as acts of one not altogether responsible, when such acts at the time left no such impression on his mind.

I must say that I was impressed by the fair and able manner in which Mr. Crease, of counsel for some of the contestants, marshalled the facts; indeed, the counsel on both sides argued the matter very ably before us.

The case is one largely of fact, and I have, therefore, been at pains to give it my best consideration.

*Appeal allowed.*

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## BRITISH COLUMBIA.

APRIL 1ST, 1912.

### COURT OF APPEAL.

### BINGHAM v. SHUMATE.

*Trusts and Trustees—Trust Agreement—Action for Cancellation—Fraud and Misrepresentation—Failure to Prove—Removal of Trustee—Grounds for—Counterclaim—Direction to Cestuis que Trust to Execute Conveyances—Unnecessary Directions.*

**By a contract declaring the rights and interests of the plaintiffs and the defendant S. in certain timber licenses, it was agreed that the defendant S. (as trustee) should have the right and privilege of selling the licenses, without reference to his associates and *cestuis que trust*, provided that he did so on the terms specified in the agreement. In an action for cancellation of this agreement because of misrepresentation or fraud, the defendant S. counterclaimed for a direction to the plaintiffs to execute documents to carry out a sale made by S. to F.:—**

***Held*, that the fraud or misrepresentation charged against the defendants was not proved, and the action was properly dismissed.**

***Held*, also, that it was unnecessary for the plaintiffs to execute the documents; and that the counterclaim should have been dismissed.**

***Held*, also (IRVING, J.A., dissenting), that no case was made for removing the defendant S. from his trusteeship; and, besides, that was not asked in the statement of claim nor in the notice of appeal.**

**Judgment of CLEMENT, J., varied.**

Appeal by the plaintiffs from the judgment of MORRISON, J., at the trial, dismissing the plaintiffs' action, which was brought for the cancellation of a deed, on the ground of misrepresentation or fraud, for an account, and other relief; and in favour of the defendant Shumate upon his counterclaim, to compel the plaintiffs to execute certain documents.

The appeal was heard by MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Maclean, K.C., for the plaintiffs.

Bodwell, K.C., for the defendants.

MACDONALD, C.J.A.:—The trial Judge has negatived the fraud or misrepresentation charged by the plaintiffs against the defendants in connection with the trust agree-

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ment. In this, I think, he was right; but I think he was in error in finding in the defendant Shumate's favour on his counterclaim.

By the contract of the 24th October, 1907, which declared the rights and interests of the parties in the subject-matter of this action, it was agreed that the defendant Shumate should have the right and privilege of selling the timber licenses mentioned in the pleadings, without reference to his associates and cestuis que trust, provided that he did so on the terms specified in the agreement. By his counterclaim, alleging that he had made a sale to Messrs. Fields in accordance with the said power, the defendant Shumate asked that the plaintiffs be ordered to execute the documents of sale. The licenses being vested in himself as trustee, he had no need of the plaintiffs' concurrence, nor of their signatures to the documents, provided the sale was within the power. If the sale were not within the power, then the plaintiffs should not have been ordered to concur. The order, therefore, that the plaintiffs should execute these documents was, in my opinion, unnecessary; and the judgment on the counterclaim should be reversed.

It would not be necessary, in my view of the case, to say more, were it not for the contention before us that the defendant Shumate should be removed from his trusteeship. That question was not properly before us at all, although it was referred to and argued to a certain extent by Mr. Maclean, for the plaintiffs. Mr. Bodwell took some objection; but Mr. Maclean was not stopped. It was not brought to our attention that no claim of this kind was made in the pleadings, nor was the question raised in the notice of appeal. That being so, we ought not to make the order asked for. It is quite apparent that no evidence was directed to it. The evidence that was relied upon, in what little argument there was, was directed to an entirely different issue. Shortly, Mr. Maclean's argument was, that, because the defendant Shumate entered into an agreement of sale with Messrs. Fields, which was not strictly in compliance with his power of sale, we ought to hold that he was not a fit and proper person to remain a trustee. What Shumate did was to sell, or attempt to sell, the licenses for the price mentioned in his power; but, instead of paying the whole 50 per cent. in cash, the purchasers were to pay sufficient to



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give the plaintiffs half of their interest in cash, and the balance in a year—Shumate's interest to be otherwise arranged. There is no evidence that in such an arrangement Shumate was to get any more advantageous terms than the plaintiffs; in fact, for aught the evidence shews, they may have been much less advantageous. That question was not sifted down, because it was not in issue.

I do not understand the law to be that, whenever a trustee makes a mistake as to the extent of his powers, he ought to be removed from his trusteeship. Now, had the issue been raised and Shumate charged with dishonesty in connection with the alleged sale to the Fields, evidence might have been forthcoming to shew that he acted, as he believed, honestly and in the interest of the partnership, and without seeking any peculiar advantage for himself. To allow this issue to be raised now would be most unjust to the said defendant.

I think, therefore, that the judgment dismissing the action should be sustained; but that part of it based on the counterclaim should be reversed.

A question of account was referred to in argument; but, as I remember, counsel for the plaintiffs did not press that.

GALLIHER, J.A., concurred.

IRVING, J.A.:—The learned trial Judge dismissed the plaintiffs' action, and on the counterclaim directed that the plaintiffs should execute all documents necessary to enable the defendant Shumate to carry out a sale to Messrs. Fields. This portion of the judgment is easily dealt with.

The evidence at the trial shews that Shumate has not sold the property to Fields, and there is no contract between Shumate and Fields. At the most, Fields was prepared to buy the plaintiffs' interest.

Then as to the appeal in the original action. The notice of appeal is, that the Judge below only considered one branch of the plaintiffs' claim for relief—that is, the application to set aside and cancel the deed of the 23rd October, 1907, on the ground of fraud. The other ground is for an order for accounts, and the removal of Shumate from his office as trustee. The notice, I feel, ought to have been more explicit; and the only doubt I have about the order that should be made is on account of the vagueness of the notice of appeal.

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Shumate, in his letter of the 16th November, 1910, did not disclose the true facts of the case; and, in my opinion, he is unfitted to be a trustee. Had he been honest, he would have written Bingham, "I can get you $10 an acre for your share, will you take it?

The removal of a trustee—as a rule—is a delicate matter. The main principle for the Court to proceed upon in exercising its jurisdiction is the welfare of the beneficiaries. The matter of the exercise of this power was discussed in Letterstedt v. Broers (1884), 9 App. Cas. 371, by Lord Blackburn. In Forster v. Davies (1861), 4 DeG. F. & J. 133, it was laid down by Turner, L.J., that the mere fact of there being dissension between one of the several cestuis que trust and the trustee was not a sufficient ground for the trustee's removal. But the letter, in my opinion, is sufficient to shew that Shumate should be removed from his position as trustee and a receiver appointed.

As to the objection that the removal of a trustee was not specifically asked for; in my opinion, the prayer in the original claim for a receiver was sufficient. In view of the fact that the action asked to set aside the trust deed; that it is merely a technical objection; and as the merits are all against Shumate, and as there has been no surprise or disadvantage to Shumate by the formal omission, I would not give effect to it: Gorman v. Dixon (1896), 26 S. C. R. 87. In In re Wrightson, [1908] 1 Ch. 789, where Warrington, J., refused to remove a trustee, he said that there was power to remove, although not prayed for.

I would discharge the order made by Morrison, J., and dismiss the action so far as false representations are concerned, but remove Shumate from the trusteeship, and order him to account; divide the costs of the action below; direct Shumate to pay costs of the counterclaim and of this appeal.

*Judgment below varied.*

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## BRITISH COLUMBIA.

APRIL 1ST, 1912.

COURT OF APPEAL.

## GREENWOOD v. BANCROFT.

*Landlord and Tenant—Lease—Renewal — Option — Unsigned Notice — Surrender — Consideration — Letter not under Seal—Estoppel.*

**The defendant had a lease of premises for five years from the 22nd December, 1902, with an option of a further term of five, upon the stipulation that he should give six months' notice in writing of his intention to exercise the option. The defendant gave the notice, but did not sign it. He, however, remained in possession after the expiry of the first five years; but on the 8th February, 1908, wrote and signed a letter agreeing to "take off" two years from his lease:—**

***Held*, that the landlord was entitled to possession after the 23rd December, 1910.**

***Per* IRVING, J.A.:—The unsigned notice was not such a notice as was required by the original lease. There was a surrender by operation of law; and the letter of the 8th February created an estoppel.**

***Fenner* v. *Blake*, [1900] 1 Q. B. 426, followed.**

***Per* GALLIHER, J.A.:—The landlord believed that the term had ended; and his forbearance to bring action was a good consideration for the compromise that was effected by taking two years off the term. It is not necessary, since the British Columbia Act of 1903-4, ch. 20, sec. 3, that a surrender of a portion of a term granted by instrument under seal should be by writing under seal.**

Appeal by the defendant from the judgment of GREGORY, J., in favour of the plaintiff, in an action for possession of demised premises.

The appeal was heard by MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Aikman, for the plaintiff.

Maclean, K.C., for the defendant.

IRVING, J.A.:—The defendant, by an agreement under seal, dated the 4th September, 1902, obtained from Mr. Redfern a lease of the premises known as 45 Government street for a term of five years, to date from the surrender of the then tenants, rent payable monthly in advance, with the option to take the premises for a further term of five years at an annual rent of $1,080, to be payable and paid in the same manner; and it was stipulated that, if he should elect to

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exercise the option aforesaid, he should give six months' notice in writing of his intention.

The defendant took possession on the 22nd December, 1902, I gather; and the term would expire on the 23rd December, 1907; and on the 4th or 6th March, 1907, delivered to Edgar Crow Baker a written notice, dated the 4th March, 1907, of the exercise by him of his option. The notice was not signed.

On the 22nd November, 1906, Mr. Redfern conveyed to Messrs. Edgar Crow Baker and A. C. Flumerfelt, and on the 17th November, 1909, they conveyed to the plaintiff, who, on the 21st March, 1911, brought this action. His claim was, that no proper notice of the exercise of the option had been given after the lease had expired, and that later, namely, on the 8th February, 1908, the defendant had agreed to accept, in lieu of the five-year extension, a three-year extension, which did terminate on the 23rd December, 1910. The defendant wrote this letter (exhibit 2): "I agree to take off from my lease two years on the premises that I occupied known as old No. 45, new No. 1013, Government St., Redfern's block, city of Victoria, B.C. Yours very truly, Art Bancroft."

The plaintiff, on the 8th March, accepted two months' rent at $90 for the interval between the 23rd December, 1907, and the 23rd February, 1908.

The defendant says that he delivered, on the 6th March, 1907, duly signed notices, and that the consideration for the letter (exhibit 2) was a verbal promise by Edgar Crow Baker, that, if he (defendant) would knock off two years from the extension, he (Baker) would build certain additions which the defendant was anxious to have, and which had been discussed in 1907; for these additions the defendant was to pay $25 extra.

The defendant says that this promise has never been fulfilled; that in April, 1908, Edgar Crow Baker told him that he could not carry out his agreement.

All the documentary evidence is against this statement of facts made by the defendant; and the trial Judge quite rightly declined to accept his story.

The defendant did not give the notice required by the original lease—an unsigned notice did not bind him.



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The case of Fenner v. Blake, [1900] 1 Q. B. 426, seems to me to be an authority in the plaintiff's favour on two grounds: (1) that there was a surrender by operation of law; and (2) that the letter of the 8th February, 1908, creates an estoppel which prevents the tenant from saying that his tenancy was to last longer than three years.

I would dismiss the appeal.

GALLIHER, J.A.:—I think the appeal should be dismissed.

I accept the evidence of the witness Edgar Crow Baker that the only time when it was agreed that he and his co-owner should erect an addition to the premises for which the defendant was to pay extra rent was in 1907, when the new lease was prepared and tendered, and which lease the defendant, on advice of counsel, refused to sign.

This being so, it forms no part of the consideration for the document exhibit 2, as alleged by the defendant.

It was contended by the appellant that, other than this promise to improve the premises, there was no consideration for this document, which is in effect a release of two years of the renewal term under the agreement between Redfern and the defendant.

I agree with the learned trial Judge that, while Mr. Crow Baker misconceived his legal rights, he made his claim honestly and bona fide, believing that the term had ended; and that the forbearance to bring action to enforce that claim was a good consideration for the compromise which was effected: Callisher v. Bischoffsheim (1870), L. R. 5 Q. B. 449.

Mr. Aikman also contended that the surrender of a portion of a term granted by instrument under seal must be by writing under seal; but this is, I think, fully covered by the words of our statute, ch. 20, sec. 3, of 1903-4, which are, "by deed or note in writing signed by the party . . surrendering the same."

The further objection was raised by Mr. Aikman that it was not shewn that Mr. Crow Baker had any authority to bind his co-owner Flumerfelt; but, as this point was not taken in the Court below, and is not raised on the pleadings, or in the notice of appeal, I decline to consider it.

MACDONALD, C.J.A., agreed that the appeal should be dismissed.

*Appeal dismissed with costs.*

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## BRITISH COLUMBIA.

APRIL 2ND, 1912.

COURT OF APPEAL.

# LATHAM v. HEAPS.

*Master and Servant—Injury to Servant—Negligence—Contributory Negligence—Findings of Jury—Nonsuit.*

**In an action to recover damages for personal injuries sustained by the plaintiff, while working for the defendant, as an engineer, owing, as alleged, to the negligence of the defendant or his foreman, the jury found a verdict for the plaintiff:—**

***Held*** **(MACDONALD, C.J.A., dissenting), that the verdict should be set aside and the action dismissed.**

***Per*** **IRVING, J.A.:—The plaintiff did not make out a case of negligence against the defendant such as should have been submitted to the jury; and there should have been a nonsuit.**

***Per*** **GALLIHER, J.A.:—There was evidence of contributory negligence on the part of the plaintiff sufficient to justify the withdrawal of the case from the jury.**

***Per*** **MACDONALD, C.J.A.:—There was sufficient evidence to justify the jury in finding negligence for which the defendant was responsible, and the absence of contributory negligence on the part of the plaintiff.**

Appeal by the defendant from the judgment of CLEMENT, J., upon the findings of a jury, in favour of the plaintiff, in an action for damages for personal injuries sustained by him while working for the defendant as an engineer, owing, as alleged, to the negligence of the defendant, or his other servants.

The appeal was heard by MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Craig, for the defendant.

McCrossan and St. John, for the plaintiff.

IRVING, J.A.:—The learned trial Judge told the jury that there was no evidence of negligence at common law. In that I agree. He did, however, leave to them the question, "Was there negligence under the Employers' Liability Act?"

The particular question was, "Was the order which Clark gave just before the accident took place a negligent order under the circumstances?"

The jury were also asked to pass on the question of contributory negligence.

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The verdict was, "We find for the full amount for the plaintiff."

The onus of proving affirmatively that the plaintiff was guilty of contributory negligence rests in the first instance upon the defendant. In the absence of evidence tending to that conclusion, the plaintiff is not bound to prove the negative in order to entitle him to a verdict on that point.

But the other point raised is more difficult; and, in considering that question, it will be necessary to discuss the plaintiff's conduct, not for the purpose of establishing contributory negligence on his part—that question I have already disposed of—but for the purpose of discovering the true cause of the accident, and determining whether the plaintiff has made out such a case as should go to the jury.

The 3rd sub-section of sec. 3 of the British Columbia Employers' Liability Act provides that a workman injured by reason of the negligence of any person in the service of the employer to whose orders the workman was bound to conform, and did conform, where such injury resulted from his having so conformed, shall have the same remedies against his employer as if he had not been in the employ of the defendants.

To establish a case, the plaintiff must prove, inter alia, these two things—the injury must have resulted from his having conformed to the other, and from the negligence of the foreman who gave the order. In Wild v. Waygood, [1892] 1 Q. B. 783, the sub-section was discussed; and, so far as I know, that case has never been questioned. The injury must be the result of the two things above mentioned; then, if they are so connected together as to cause the injury, the case comes within the sub-section.

The order was to loosen or slack off the main cable upon which the engine was being drawn up a hill, and then to give the engine a good head of steam. There is no trouble in seeing that when the engine, after the steam has been turned on, begins to wind up the cable over the drum, there will come a violent jerk when the slack is used up. The intention was to make use of this jerk in carrying the engine over the obstruction or hill, whatever it was that had caused the stoppage.

The foreman had, we were told frequently during the argument, addressed his orders to the plaintiff in an angry tone of voice. That does not affect the case, in my opinion,

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one way or the other, although, no doubt, it might influence the jury; but where is there any negligence about the order and the evolution? The plaintiff says he does not think he ever did it before, i.e., slacking off the main line and starting the engine up again, when pulling the donkey, but he has when drawing in a train of logs. The case the plaintiff makes is, that the order was wrong because pulling the donkey through the woods he had not the same safe platform to stand on, when he overcame an obstruction by jerking the engine, as he had when the engine was stationary.

In moving through the woods, the engine is stripped down to the runners, and on the runner at the right hand side, a man could stand. The plaintiff admits this, but says it would be a very small place, and to work his levers he would have to stand in an awkward position. The plaintiff placed his feet on two iron handles, the handles of the levers which work the drums—one of these levers was loose, and swinging backward and forward. There was no evidence that the foreman knew that the plaintiff had elected to ride with his feet on these handles, instead of on the runner; nor that the plaintiff had ever complained of the insufficiency of the foothold afforded by the runners.

There seems to me an obvious difference between an order to slack off the cable and give her a head of steam simply, and the same order with a further direction to carry out the manœuvre by standing in a particular place. How can a jury say that there was negligence on the part of the foreman under these circumstances? or that the accident came about through the plaintiff conforming to the order given?

This accident took place because the plaintiff placed his feet on the swinging handles — the foot-hold there was insufficient, and he had no order to put his feet there.

I think this is a case where the Judge would have been justified in refusing to let the case go to the jury.

GALLIHER, J.A.:—After the best consideration I can give to this case, I have come to the conclusion that the appeal should be allowed.

Considering the nature of the operations, and the surrounding circumstances, I think there was a reasonably safe place on the runner where the plaintiff should have stood, instead of, as he did, on what might be termed a swinging

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crank, certainly a much more dangerous position going over rough ground—in fact, he admits negligence. "Q. So if a man stood on those handles, when he could properly and conveniently have stood on the runner, that man was negligent? A. Yes."

I do not pick out this one question and answer to base my judgment upon, but have carefully considered the evidence of all the witnesses, and am of opinion that a jury could not reasonably have failed to find contributory negligence.

As to whether the foreman's order was a negligent order, I do not think it was, even allowing for the condition of the engine.

It seems a very usual way of starting the engine under such circumstances, and the defects in the engine were not, in my opinion, such as would warrant the order being so classed.

MACDONALD, C.J.A. (dissenting):—This appeal turns wholly upon questions of fact; and, after a careful perusal of the evidence, I have come to the conclusion that there was sufficient to justify the jury in finding negligence for which the employer was responsible, and the absence of contributory negligence on the part of the plaintiff. The issue of contributory negligence I have found the most difficult. The accident happened while a donkey engine was being moved from one position to another. The modus operandi of moving the engine was by the use of lines ordinarily used for hauling logs. One of these lines was attached to a tree or some other stationary object. The engine, with its own steam, then would haul on this line, and in this way be dragged along in the direction desired. There were two winding drums, one for hauling, the other for taking in the slack, and projecting from the end of each drum was a crank or lever. In the operation it was necessary for the engineer to place one foot upon what was called the friction lever, so as to put friction on the drum; he had also to have his hand on the throttle of the engine. On this occasion, the plaintiff, who was the engineer, stood with one foot upon the projecting lever or crank of the drum which was not being used, and the other on the lever or crank of the drum which was used for friction. Standing thus, he was able to put on friction when required, and to have

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his hand on the throttle. While so standing, the engine stuck fast, and after two or three ineffectual attempts by putting on additional steam to get it to move, the defendant's foreman, who was there assisting in the operation, angrily shouted at the plaintiff, and with an oath said: "Slacken her up and give her her head." This meant that the plaintiff was to slacken the hauling line and open up the throttle, so that the engine would be jerked forward. In carrying out this order, the plaintiff was thrown from his position and injured.

The defendant's contention is, that the plaintiff ought not to have been standing upon the two levers as he was, but should have stood with one foot upon the runner which supported the engine, and the other upon the friction lever. There was neither rule nor instructions with regard to how he should stand. The plaintiff and a number of his witnesses says, that the runner was too narrow to enable him to stand safely on it; that, standing on the runner, the revolving crank-wheel and crank-pin of the engine would be front of his body. The evidence is, that the runner projected only 6½ inches beyond this revolving crank-pin. It is also stated that the upper surface of the runner, which was a log hewn on two sides, was somewhat rounded and slippery; and there is the evidence of Townley, who acted as engineer in the moving of the same engine previously on one occasion, and who stood on this runner in performing a like operation, that he was thrown off and had his knee injured by the crank-pin. The fact seems to be that there was no really safe place for the engineer to stand; and there appears to have been no general rule followed by engineers with respect to where they should stand.

Sharpley, a witness for the defendant, said: "Some stand facing the side of the donkey, and some stand sidewise; some stand on the haul back lever and sometimes . . they all go different anyway." Roberts, another of the defendant's witnesses, was asked, "How does the engineer stand?" And he answered, "He stands anyway at all, I guess." And Dineen, the defendant's witness, was asked the question, "He ought to know his own engine?" And he answered, "Yes, they all stand differently." Clark, the defendant's foreman, says: "He should stand with his right foot on the main lever, and his other foot on the sleigh, or either use his hand to hold the friction. It is up to him to do

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what he likes." And Townley, one of the plaintiff's witnesses above referred to, says that some engineers ride on their friction levers.

There is, of course, the expression of many opinions by witnesses as to the proper way to stand; but, having regard to the evidence to which I have adverted, it would seem to be a matter of choice between two or more dangerous and awkward positions; but, even if it were thought that the plaintiff made a mistake of judgment, the jury might properly absolve him of the charge of contributory negligence.

I would dismiss the appeal.

*Appeal allowed;* MACDONALD, C.J.A., *dissenting.*

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THE

# Western Law Reporter

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## BRITISH COLUMBIA.

APRIL 2ND, 1912.

### COURT OF APPEAL.

### ROMANG v. TAMBURRI.

*Husband and Wife—Tenancy by the Curtesy—Statutes—Deed.*

**The judgment of MURPHY, J., 17 W. L. R. 133, was affirmed.**

Appeal by the defendants from the judgment of MURPHY, J., 17 W. L. R. 133.

The appeal was heard by MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

J. A. Russell, for the defendants.

W. A. Macdonald, K.C., for the plaintiff.

MACDONALD, C.J.A.:—I would dismiss this appeal. The Act R. S. B. C. 1897 ch. 97, sec. 22, preserved to a husband his tenancy by the curtesy of England. By ch. 40 of the Acts of 1898, being an Act to give effect to the Revised Statutes of British Columbia 1897, the said Revised Statutes were given the force of law, subject to the amendments set forth in the first schedule to ch. 40. Section 5 of the latter Act must be read in connection with sec. 1; and, thus read, I think there is no doubt that the amendment made to ch. 97 by the schedule, reading as follows—"(5) If the intestate should leave a widow or husband him or her surviving, such widow or husband as the case may be shall be entitled, in



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case the intestate has left no lawful descendant, to one-half of such real estate absolutely, and in case the intestate has left lawful descendants him or her surviving, then to one-third of such real estate for life"—is applicable to the facts of this case; and that the husband is, therefore, entitled to a life estate in one-third only of the land in question.

I would dismiss the appeal.

IRVING, J.A.:—Prior to the passage of the Act of 1908, the father, Joseph, would, as tenant by curtesy, have been entitled to the whole of his wife's real estate for life. The 5th sub-section of that Act, under the circumstances of this case, has cut his interest down to one-third for life.

I can see many reasons for saying that the tenancy by curtesy has not been abolished; but this case, I think, can be determined upon the statute of 1908, and the facts of this particular case.

I would dismiss the appeal.

GALLIHER, J.A.:—I agree entirely in the judgment of the learned trial Judge, and would dismiss the appeal.

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## BRITISH COLUMBIA.

APRIL 2ND, 1912.

COURT OF APPEAL.

## LANGAN v. NEWBERRY.

*Vendor and Purchaser—Contract for Sale of Land—Option—Payments—Time — Default — Cancellation by Vendor—Non-delivery of Abstract of Title—Ground for Refusing to Make Payments—Specific Performance.*

The judgment of CLEMENT, J., 18 W. L. R. 458, was reversed, and a judgment for the plaintiffs for specific performance was pronounced, on the ground that they had not put an end to the contract for the purchase of the land in question by non-payment of the purchase-money, the defendant not having complied with their lawful demand for the production of evidence of title.

*Per* MACDONALD, C.J.A., that the vendor was under obligation to furnish an abstract on demand of the purchasers; and the vendor was not entitled to call for payment of the purchase-money until he had complied with the demand.

*Cameron* v. *Carter*, 9 O. R. 426, approved.

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Appeal by the plaintiffs from the judgment of CLEMENT, J., 18 W. L. R. 458.

The appeal was heard by MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Bodwell, K.C., for the plaintiffs.

J. L. Mackay, for the defendant.

MACDONALD, C.J.A.:—The two agreements in question in this action, dated the 18th November, 1910, are for the sale by the defendant to one Ryan, the plaintiffs' assignor, of two parcels of land. They are practically in identical terms, the one with respect to one parcel, and the other to the other. One parcel may be conveniently designated the Wakefield lot, and the other the Kendall lot. The defendant, prior to the 18th November, agreed with Kendall to purchase his lot, on deferred payments. He had paid a deposit of $50, and taken a receipt therefor. The defendant and one Clark had bought the Wakefield lot on similar terms, but had a formal agreement of purchase, which was registered, at all events before the commencement of this action. It also appears that the defendant had an assignment of Clark's interest, which was not registered. These agreements were not shewn to Ryan, with the exception of the receipt for the $50. On the 19th November, the defendant procured a formal agreement from Kendall, which was not shewn to Ryan.

By the agreements of the 18th November, the purchaser was to pay and did pay a deposit on each transaction of $500; the balance of the defendant's "equity," as it has been called, amounting to almost $8,000 on the two transactions, was to be paid to the defendant on the 1st January; and the balance of the purchase-price was to be paid to the defendant's vendors, Wakefield and Kendall, being the instalments falling due upon their agreements with the defendant. Time was declared to be of the essence of the agreements. Early in December, the plaintiffs requested the defendant to shew them the agreements under which he held the property; and, I think, the inference from the evidence is irresistible that they were refused such inspection. Failing to get such inspection, the plaintiffs, on the 27th December, formally notified the defendant that they intended to proceed with the purchase, and demanded a solicitor's ab-

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stract of title. This demand was ignored, and the plaintiffs did not make the January payments. When they took the matter up with the defendant, within two or three days afterwards, the defendant in effect declared the agreements cancelled for non-payment on the 1st January. It was contended before us that the agreements of the 18th November were merely options, and that failure to pay on the day agreed upon, and the defendant's election to cancel, put an end to the plaintiffs' right to insist upon having the lots. I do not read the agreements as mere options. The documents themselves purport to be agreements for sale; and, while not signed by the purchaser, yet were treated by all parties as agreements for sale. I think the conduct of the parties shews that there was an acceptance, either by words or conduct, on the part of the purchaser at the time the agreements were made, or at all events long before the notice of the 27th December. However that may be, the notice of the 27th December was clearly an acceptance. I do not stop here to inquire whether it would make any difference to this case if I were to treat the agreements as options. The real question I have to decide is, whether or not the vendor was under obligation to furnish an abstract on demand of the purchaser; and, if he was, whether his failure to do so disentitled him to call for payment of the purchase-money until he had complied with the demand. We were not referred to any authority; but on the argument I was strongly of opinion that the plaintiffs' contention was right, and that an abstract should have been furnished, and this has been strengthened by reference to Townsend v. Graham, 6 B. C. R. 539, where my brother Martin, then sitting in the Supreme Court, decided a somewhat similar question. He referred to some Ontario cases, notably Cameron v. Carter, 9 O. R. 426, in which the learned Chancellor of Ontario, after agreeing with the rule laid down by Esten, V.-C., in Gamble v. Gummerson, 9 Gr. 193, said: "I think that the rule has often been recognised in this Court, that when the price is payable by instalments the purchaser has a right to have a reference as to title, and to have title manifested before he makes a single payment."

The learned Judge appealed from was of opinion that in cases like the present the English practice of delivering a solicitor's abstract ought not to be imported into this province; but it seems to me that that practice was imported

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into this province with the common law, and was always in force here. True, it may be more honoured in the breach than in the observance, owing to the loose manner in which the sale of real estate is conducted, particularly by real estate agents, who in general appear to be absolutely ignorant of the law governing the transactions in which they engage. There never was any doubt about the right of the purchased to an abstract under contracts like the present, where no restrictions were imposed upon the seller's liability to shew and make title, and where the purchase-money was to be paid at the time of completion. But here, the purchase-money in question was to be paid before the time arrived for conveyance, and the question is, in the absence of waiver, had the purchaser a right to call upon the vendor to shew his title before paying the instalments due on the 1st January? It seems to me that the rule laid down in Cameron v. Carter, supra, is a most salutary one. What might be the result if a purchaser from a person who had only an agreement of purchase from another, were not entitled to call upon such person to shew that he could sell what he purports to sell? If such a person were unscrupulous or unfortunate in being unable to meet his own payments, a purchaser from him would be paying his instalments not on the security of the land, but on that of a worthless vendor.

It was also suggested, in the reasons for judgment below, that the purchaser, having had notice that the defendant's title consisted of agreements from Wakefield and Kendall, and having agreed to accept assignments of those agreements, and pay the balance of the purchase-moneys due thereon, must look to Kendall and Wakefield to shew and make title. I do not think such a conclusion could be arrived at from the agreements themselves. The clause is very inaptly worded, but it is plain enough what is meant. It means that the purchaser is to pay the balance of the purchase-price, that is, of the price which Ryan agreed to pay to the defendant, by assuming the payments in the Wakefield and Kendall agreements. I do not think the clause can be read as tantamount to an agreement to purchase merely all the right, title, and interest of the defendant in those two agreements. Ryan had not seen those agreements at the time he agreed to purchase from the defendant, and they only came into the transaction in connection with the payment of the balance of the purchase-money. But, even if the

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learned Judge was right in considering that the plaintiffs should be compelled to look only to Wakefield and Kendall to make their title when the time arrived for completion, still I think the defendant was obliged to shew the title from Kendall and Wakefield and Clark to himself, that is to say, the two agreements under which he held these lands, and the assignment from Clark, so that the plaintiffs might satisfy themselves whether or not those agreements gave the defendant the right to the fee.

The defendant's attitude, as shewn by his evidence, was, that he was obliged to do nothing until the plaintiffs came with their money, on or before the 1st January. He said that, when they came with the money, he would hand them over the agreements. That position, I think, is not tenable. The plaintiffs were entitled to a reasonable time to investigate. Even if it could be said, as the learned Judge thought, that the time between the 27th December and 1st January was too short to permit of reasonable notice to the defendant to deliver an abstract, yet it cannot be said that the demand for inspection of the agreements which was made early in December was not made in ample time to permit the production of these agreements which the defendant says were in his possession all the time.

In my opinion, the plaintiffs were not obliged to pay their money on the 1st January, nor until the defendant had complied with their demand for a solicitor's abstract of title, shewing not only the Wakefield, Kendall, and Clark agreements, but also the title back to the fee.

In this view of the matter, the plaintiffs were not in default; and, having made proper tenders before the commencement of this action, they are entitled to specific performance; and I would make an order accordingly; the costs of the action and of this appeal to be given to the plaintiffs; and, unless the parties can agree, there should be a reference to the Registrar with regard to title.

IRVING, J.A.:—The defendant, holding two contracts for sale to him of two lots, agreed with the plaintiff Ryan to sell the said lots to him, and he executed two separate receipts. As they are identical in terms, it is sufficient to set out one of them:—

"Interim Receipt.

"Vancouver, B.C., Nov. 18th, 1910.

"Received from W. B. Ryan the sum of $500, being deposit on account of purchase of 13.74 acres lot 15, sub-

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division 463, Coquitlam, for the sum of $4,830, on the following terms: $500 cash, $2,330 on Jan. 1st, 1911; balance will assign my agreement Wakefield to myself.

"The deferred payments to bear interest at the rate of 7 per cent. per annum until paid. Net. No commission.

"Time is the essence of this agreement, and unless payments with interest are punctually made, at the time or times appointed, this sale shall be (at the option of the vendor) absolutely cancelled or rescinded, and all money paid on account hereof forfeited to the vendor as and for liquidated and ascertained damages. Cost of conveyance, $5, to be paid by the purchaser. This receipt is given by the undersigned as agent and subject to the owner's confirmation.

"F. M. Newberry, owner."

These receipts shew on their face that the purchaser knew that the title to the land then being bought was not then in the defendant. It was agreed that time was to be of the essence; that the cost of the conveyance should be paid by the purchaser. Does this mean the conveyance of the land itself, or of the defendant's interest? As the receipt amounted to an assignment of the defendant's interest, this disposes of the learned Judge's contention that Newberry was to drop out, and that, without more, the obligation to shew title to the fee was intended to rest with the defendant's vendors.

It is well to consider what the true position of the defendant Ryan was. According to the law of conveyancing, it is the vendor's duty, unless there are express stipulations to the contrary: (1) to shew a good title, i.e., by delivering a proper abstract and later verifying the same; (2) if the title is accepted, to convey free from incumbrances, and to put the purchaser in possession.

The purchaser's duties are: (1) to examine the title deeds, and when a good title is shewn to accept it; (2) then to tender a deed for execution, and also the whole amount due.

Unless definite dates are fixed, these things are to be done within reasonable time; but, from the moment the agreement is made, the property belongs to the purchaser.

In these receipts no dates are fixed for the performing of these preliminaries. The expression as to time being of the essence can, therefore, only relate to the dates of payment.

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The purchaser called on the vendor and asked to see the documents which he (the purchaser) had obtained from his vendor. This may be regarded as a waiver of the production of the abstract. It is open to the parties to waive any of their rights. In Barclay v. Messenger, 43 L. J. Ch. 449, it was waived by the conditions; and in Foot v. Mason, 3 B. C. R. 380, it was waived orally. The waiver of an abstract, however, does not waive the production of the deeds; and I think it was the defendant's duty to produce them when requested, but he refused to do so.

After some little time, Ryan assigned the agreements to Langan, who notified the defendant that he would buy, and on the 29th December called for abstracts of the defendant's title.

Having regard to the fact that the defendant had been previously asked to produce the evidences of his title, and that he says he had them in his safe, I think this demand was not made unreasonably late, nor the time unreasonably short.

The learned trial Judge regarded this demand as a subterfuge. I do not see that that necessarily follows. It is true that the purchaser might allege non-compliance with this request as an excuse or justification for not paying on the 1st January; but, if that was the object, it did not, in my opinion, excuse the vendor from satisfying the demand. The vendor could very easily have abstracted and produced all the papers he had within half an hour; but he did nothing. I am not, therefore, called upon to say what, if anything, beyond the agreements with his vendors, he was bound to abstract and offer to produce. He made default, and not only continued in default until after the 1st January, the day fixed for payment, but afterwards intimated that he was not going to complete. On the 2nd January (the 1st fell on a Sunday)—possibly it was the 3rd—the plaintiff's agent attended him with a deed, and an agreement for execution, but the defendant declined to look at them. Mercer swears that this took place on the 2nd January; Newberry says that it might have been in the first week in January, but says it was not the 1st or 2nd. Mrs. Mulholland swears it was after the 3rd or 4th, in fact the second week in January; but I think her evidence is absolutely unreliable. I should be inclined to accept the 2nd or 3rd as the date of Mercer's visit.

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From what happened at that interview, I am satisfied that the defendant was then, and had been at the time when he was requested to shew his title, endeavouring to bring about a deadlock, with a view to preventing this contract being carried out. Tactics like these should not be allowed to prevail. I would direct specific performance, on the ground that there was no disclosure of the defendant's title. This he impliedly agreed to do before the date for payment.

GALLIHER, J.A., agreed in allowing the appeal.

*Appeal allowed.*

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## BRITISH COLUMBIA.

APRIL 2ND, 1912.

COURT OF APPEAL.

## WATTSBURG LUMBER CO. v. W. E. COOKE LUMBER CO.

*Negligence — Towage — Evidence — Onus — Failure to Shew Negligence or Prove Contract.*

*Held*, reversing the judgment of MORRISON, J., 17 W. L. R. 129, that the arrangement between the plaintiffs and defendants as to the moving of the plaintiffs' boom of logs by the defendants' tug, was a friendly one, altogether outside the scope of the business of towage, and the onus was upon the plaintiffs to prove negligence or unskilfulness, and in that they had failed.

*Held*, also, that the appeal should be allowed and the action dismissed: IRVING, J., dissenting and being of opinion that there should be a new trial.

*Semble*, also, that a sketch of the locality, purporting to shew the boom at different points in its course, and the position of the tug, and the relation of the boom to the dolphin, and other matters of that kind, was improperly admitted in evidence.

*Beamon* v. *Ellice* (1831), 4 C. & P. 585, specially referred to.

Appeal by the defendants from the judgment of MORRISON, J., 17 W. L. R. 129.

The appeal was heard by MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

W. A. Macdonald, K.C., for the defendants.

S. S. Taylor, K.C., for the plaintiffs.

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MACDONALD, C.J.A.:—I think that the fundamental error in the reasons for judgment below is to be found in the assumption that the defendants entered into the ordinary contract of towage with the plaintiffs, that the contractors were bound to use a tug of sufficient strength and equipment to do the work safely and to assume the risk of weather conditions. In my view of the case, what was in the contemplation of both parties was, that that tug, with its then equipment, and on the morning in question, and under at least the partial direction and with the assistance of the plaintiffs' servants, was to move the boom in question. The defendants wished to borrow some boom sticks from the plaintiffs, and the plaintiffs asked the defendants to move the boom around to their jack ladder. It was a friendly arrangement, altogether outside the scope of the business of towage, in which the defendants were not engaged. While I agree that Yates had authority and did make this arrangement, I do not think that either party had any notion that it was other than the lending of assistance by the defendants to the plaintiffs for the mutual benefit of both, and with the appliances that they had at hand. The learned Judge below seemed to think that the defendants would be responsible for anything which happened to the boom between the time they attached their lien to it and its safe arrival at the jack ladder; that the defendants' servants had sole control and were responsible if they ventured out with it when the weather conditions were not favourable. I am unable to take this view of the transaction. I think the defendants could only be held responsible for negligence or unskilfulness in the handling of the tug where such negligence or unskilfulness caused the loss of the boom.

Now, it cannot be suggested that there was any negligence or unskilfulness up to the time when the plaintiffs' yard foreman, Williams, and his other employee, Sewell, who were assisting in the moving of the boom, tied it up to what is known as the first dolphin, and called to Captain Johnson of the tug to let go his line. If there was any negligence up to this point, it was the negligence of Williams in not fastening the boom to the dolphin with a stronger rope or steel cable. On this point the evidence of West is of importance. But, however that may be, there is no question that up to this point there was no negligence or unskilfulness on the part of those handling the tug.

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When Williams called to the captain to let go his line, and back away, Williams says they were through with the tug; after that they proposed to guide the boom down with the rope in the current to its place of destination. The crucial point of the case, as I view it, turns on whether or not, as Williams and Sewell say, the captain of the tug ran his boat over this line, which fastened the boom to the dolphin, and broke it. I do not think the defendants can be held responsible for anything that happened after the breaking of the line, because what the persons in charge of the tug did was done at the direction of Williams and on account of signals made by the plaintiffs. Taking the view I have above expressed, the plaintiffs can succeed only if they have satisfied the Court that the rope was broken in the manner Williams and Sewell say it was. Now, unfortunately, as I think, the learned Judge makes no finding on this point. His judgment is based upon entirely different grounds, and such as, with respect, I am unable to adopt. There is a direct conflict between Williams and Sewell on the one side and Johnson and E. J. Cooke on the other as to whether or not the tug did, as Williams and Sewell say, run over this line and break it. The only other witness who throws any light on this crucial point in dispute is C. H. Houle, who was at the time in the plaintiffs' employ, and was in the neighbourhood of the jack ladder where he could see the position of the boom and the tug at the time in question. His evidence, as far as it goes, corroborates that of Johnston and Cooke. As I have already said, Williams and Sewell say that the tug ran over the line instead of backing out and away from the line. Captain Johnson, who was at the wheel, and Cooke, who was handling the tow rope, say that they were never at any time nearer than about seventy feet of this line. They attribute the breaking of the line to its insufficiency for the purpose, having regard to a gale of wind which sprang up shortly before, blowing off-shore, and which put such a strain upon the rope that it broke and allowed the boom to escape. I think the evidence sufficiently establishes that there was such a gale, in fact, the learned Judge, inferentially at least, finds so when he considers that the defendants' servants in charge of the tug were reckless and ignorant in going out with the boom in such weather. I do not agree that they were reckless in doing this, but I advert to this finding as shewing that we

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may take it as proved that there was a gale about the time the boom reached the first dolphin and was tied up with the rope by Williams. Houle's evidence also is, that the tug was never at any time near the rope in question; and, while the learned Judge criticises this witness, when giving his evidence, a perusal of the evidence itself shews that the learned Judge was under an unfortunate misapprehension which brought about this criticism. In view of the conflict of evidence, it will be useful to look at the circumstances, and endeavour to judge of the probabilities of the two stories. Williams and Sewell say that the tug was using its bow line and had no stern line; at all events, none that they could see. The importance of this, as I view it, is, that, if the tug were using its bow line, it would be heading towards the rope in question, and if it kept on going ahead, would come against the rope, and thus lend colour to the story of these two witnesses. On the other hand, the captain and Cooke, who was in charge of the line with which the work was being done, say that they were using the stern or tow line, and heading the other way. The evidence on this point is not very definite on either side; we should have been much assisted had the evidence clearly shewn in which direction the tug "was rolling" the boom; there is some evidence, but it is vague. However, it is not probable, in fact it is highly improbable, that those in charge of the boat, knowing that the boom was fastened to the dolphin by the line in question, and the importance of that, and that the line was some distance above the water, plainly in view, should run the tug over it. It is much more likely that the story of Johnson, Cooke, and Houle is correct.

I have already adverted to West's evidence. West says that the line used to fasten the boom to the dolphin should have been a steel cable. He was an experienced man, not only on the lake, but at this very place, and says he never used a rope alone, but always a cable or both. It is also to be noted that both Williams and Sewell attempt to minimise the fact that a strong wind was blowing. The impression they try to create, is, that there was no wind of any consequence at all. In the absence, therefore, of a finding by the learned Judge, and it appearing that he had not directed his mind to this phase of the question, the onus was upon the plaintiffs, if my view of the arrangements under which the boom was to be moved is right, to prove negligence or

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unskilfulness; and I think the plaintiffs have not made out their case.

It was objected by the defendants that a sketch of the locality, purporting to shew the boom at different points in its course, and the position of the tug, and the relation of the boom to the dolphin, and other matters of that kind, ought not to have been admitted: and Beamon v. Ellice (1831), 4 C. & P. 585, was cited to us as authority against its admission. I agree that the sketch was inadmissible; but, in view of the conclusion to which I have come, this ceases to be of importance.

I would allow the appeal, and dismiss the action.

GALLIHER, J.A.:—Whether the finding of the learned trial Judge that the moving of the logs was the consideration for the loan of the boom sticks and chains is borne out by the evidence may be doubtful; in any event, the defendants undertook to move them, and would be required to use such care and skill in so doing as a man would use in carrying on the operation in his own business.

Be that as it may, the whole case, in my opinion, narrows down to the manner in which the rope was broken, which allowed the logs to drift away from the dolphin to which they were moored.

Williams, the plaintiffs' witness, says that when the tug brought the boom of logs round, and he fastened them with the rope to the dolphin, they were through with the tug, and he gave orders to the captain to throw off his line and back away.

If, as Williams and Sewell swear on behalf of the plaintiffs, the tug, instead of backing out, steamed forward over the rope and broke it, then the defendants would be liable; but if, on the other hand, as Cooke and Johnson on behalf of the defendants assert, the tug did not steam towards but away from the rope, and was at no time near it, and it was the force of a high wind which had arisen, and the current bringing such a severe strain upon the rope, that broke it, then the defendants could not be held liable, on the plaintiffs' own admission that their work was done when the logs were moored to the dolphin.

I have read the learned trial Judge's judgment carefully to see if he has made any finding on this point, but I am unable to find that he directed his mind to it Had he done

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so, I should have felt the greatest hesitation in interfering with that finding; but, as he has not, it devolves upon us to consider and weigh that evidence without the advantage of seeing the witnesses in the box.

I think the preponderance of evidence is, that there was a considerable squall at that point at the time in question. I attach considerable importance to the evidence of young West. He was born and raised on the lake, and has been working on boats on it ever since he left school, and knows the locality thoroughly, and the conditions attaching to winds there. That is a feature to be taken into consideration in determining the probability as to which story is true.

Two other features seem to me to weaken the probability of the truth of the plaintiff's version.

One is, that it seems unaccountable that the captain of a boat would deliberately steam up against or upon a taut rope, which was the only thing holding the logs in place, when the course was clear for him to pull out without going near the rope; and the other is, how he would get the tug over this taut rope—he might break it by running against it, but both the plaintiffs' witnesses swear that he ran over it.

The trial Judge makes reference to the condition of Captain Johnson at the trial, but there is no suggestion by the plaintiff of anything of that nature on the day in question.

It is not an easy task to decide, where there is a conflict of evidence such as here, without an opportunity of seeing the witnesses; but I do not think any useful purpose would be served by sending the case back for a new trial.

Considering the evidence in all its aspects, and the conditions as they existed at the time, my conclusion is, that the plaintiffs' version of the breaking of the rope is not the reasonable one.

As to what took place afterwards in trying to shove the boom across to the bay after it had broken loose, I do not consider it, for what was done was, I think, at the instance of and under the directions of the plaintiffs, and against what the captain of the boat considered the best methods to pursue.

Mr. Macdonald, counsel for the defendants, raised a point as to the admissibility of a plan or sketch, and I quite agree with his contention that it should not have been admitted.

I would allow the appeal.

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IRVING, J.A.:—The point in dispute was the defendants' negligence in breaking the plaintiffs' rope, or was the rope broken owing to the wind, or other causes?

There were four witnesses who were in a position to testify as to proximity of the boat to the rope, namely, Williams, the defendants' foreman, and Sewell, his assistant, for the plaintiffs; and Johnson, the master of the tug, and Cooke.

The learned Judge took the view that Johnson was reckless or incompetent; and, basing his opinion on Johnson's condition at the trial, suggested that possibly Johnson was drunk. Now, there was no suggestion to or by any of the witnesses that Johnson on that day had been drinking, or exhibited any recklessness.

The result was, that, having discounted Johnson's evidence in this way, he found in favour of the plaintiffs' contention.

Now, in connection with the weight to be attached to the cause of the breaking of the rope, must be considered the evidence of Houle, but the learned Judge misunderstood what Houle had said, and in that way he rejected his testimony. The total result, in my opinion, brought about a mistrial.

I would order a new trial.

*Appeal allowed and action dismissed;* IRVING, J.A., *dissenting.*

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## BRITISH COLUMBIA.

APRIL 2ND, 1912.

COURT OF APPEAL.

## DAVIS v. LOWRY.

*Contract — Construction — Services in Locating Crown Lands for Purchase—Share of Profits—Amendment.*

**The plaintiff had located several parcels of land with the intention of purchasing them from the Crown, but was not able to complete the purchases. He entered into an agreement with the defendant L. to act as L.'s agent in re-locating the lands; L. was to apply for Crown grants; and the plaintiff was to be paid $1 per acre when the payment of 50 cents per acre purchase-money should be accepted**

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**by the government. Later on the same day, another agreement between the plaintiff and L. was drawn up and executed, by which the plaintiff agreed with L. to divide equally with L. all profits arising out of the disposal of the lands staked, the expenses advanced by L. to be deducted:—**

***Held*, upon the evidence, that the meaning of the later agreement was, that the plaintiff was to divide the profits he would make out of the $1 per acre; and the action, brought for a share of the profits upon the sale of the lands, was properly dismissed, and an amendment properly refused at the trial; IRVING, J.A., dissenting.**

**Judgment of MURPHY, J., affirmed.**

Appeal by the plaintiff from the judgment of MURPHY, J., dismissing the action, which was brought to recover a share of the profits made by the defendants upon the sale of lands located by the plaintiff.

The appeal was heard by MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Davis, K.C., for the plaintiff.

S. S. Taylor, K.C., for the defendants.

MACDONALD, C.J.A.:—The first agreement entered into between the parties is in no wise ambiguous; but, on the same day, what is expressed to be a "further agreement" was made, the meaning of which is the principal question—practically the only question—in this action. It may be useful to state briefly the circumstances in which these agreements were made. The plaintiff had, theretofore, located several parcels of land with the intention of purchasing them from the Crown; but he appears to have been financially unable to complete the purchases. The times within which these locations could be utilised for such purpose had nearly expired, and the intention was to re-locate them and apply for Crown grants. In these circumstances, the plaintiff entered into the principal agreement in question. On the face of the agreement, it would appear that he was to act as the agent of Lowry, who was the alter ego of the defendant Brownlee, and was to be paid $1 per acre when the payment of 50 cents per acre of purchase-money to the Government was accepted. Within a few hours after the execution of this agreement, the further agreement was drawn up and executed. It does not purport to displace the first agreement, but in it the plaintiff agrees as follows: "Davis agrees with Lowry to divide equally with the said Lowry all profits arising out of the disposal of the lands staked by himself and by Hankin and by Harvey, the expenses advanced by Lowry to be deducted."

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The plaintiff's contention is, that this substitutes for the $1 an acre clause what is virtually a partnership arrangement by which the plaintiff and Lowry are to divide the profits which should be made on the ultimate sale or disposal to others of the land to be staked. The defendants, on the other hand, contend that this was simply an agreement by Davis to divide the $1 an acre after deducting his expenses, including what he should pay Hankin and Harvey for assisting him, of locating the lands. There is a great deal of conflicting and (in part) irrelevant evidence as to what the parties meant. There are also expressions used in the power of attorney from Lowry to Brownlee, which, though dated earlier than the agreements, was drawn up and executed afterwards, and refers specifically to the two agreements, tending to support the plaintiff's claim. The power of attorney authorises just such a partnership as the plaintiff contends for. Looking only at the three documents, namely, the power of attorney and the two agreements, I should be disposed to find that the plaintiff's contention is right.

Much depends upon what the parties meant by the words in the second agreement "disposal of the lands." The true construction, as I view it, of the first agreement, standing alone, should be, not that the plaintiff was disposing of the lands to Lowry, but was acting as an agent in locating them. He and Brownlee may, however, have regarded the transaction as a disposal of the lands by the plaintiff and Lowry; and that is conceivable, bearing in mind that the plaintiff, at the time the agreements were made, was in a sense the owner; he held an inchoate right, and was in a sense selling that, subject to re-staking by him. That that was what the plaintiff meant is borne out by the letter of the 7th September, 1911, signed by Herbert C. Hankin, and addressed to the plaintiff, but written by a solicitor on the plaintiff's instructions, in which these lands are mentioned as "the land staked by me, which has been disposed of to Brownlee and Lowry on account, as it has since transpired, of the North Coast Land Company." The language there used, I think, must be considered to be the language of the plaintiff, who procured the letter to be written, and there he treats the land in question as having been disposed of by himself to Brownlee and Lowry. He even assumes that the defendants were in the beginning the agents of the lumber company. It is not



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a chance or careless expression, as the context, I think, clearly indicates. This appears to me to be an interpretation by the plaintiff himself of an expression used in the second agreement which, if so interpreted, makes the meaning of that agreement quite plain, that is to say, he was to divide the profit he would make out of the $1 per acre. This interpretation is also borne out by the plaintiff's letter to Brownlee of the 15th November, 1910, which I think is consistent only with the conclusion at which I have arrived.

It was urged on the argument that, in any event, the plaintiff is entitled to recover something from the defendants; therefore, the action ought not to have been dismissed. But the plaintiff could only so recover on an alternative claim, which was not pleaded. The learned trial Judge was requested to permit an amendment after he had delivered his judgment, which I think he rightly refused to do. The defendants professed in their pleadings to have always been ready and willing to settle with the plaintiff on the basis of their construction of the agreements. There was also evidence to shew that payments on such construction were not due when the action was commenced. There may also be a question as to the amount the plaintiff is entitled to deduct for expenses before his share of the profits can be ascertained, and there was further the declaration of counsel for the defendants at the trial that they were then ready and willing to pay the plaintiff on the basis of the construction which I find myself driven to place upon the agreements. Doubtless, the defendants will pay the plaintiff what is justly due; if they do not, the plaintiff has his right of action.

I would, therefore, dismiss the appeal.

GALLIHER, J.A., concurred.

IRVING, J.A. (dissenting):—Under the first agreement of the 26th August, 1909, the plaintiff was to cruise and stake lands for Lowry, and was to receive $1 an acre, to be paid to him when the Government accepted the 50 cents per acre deposit. As there was no definite acreage mentioned, I should assume that these payments would be made from time to time as the Government accepted the 50 cents, and that it was not the intention that Davis should receive nothing until the contract was put an end to.

Under the second agreement, the cruise and staking by the plaintiff was to be continued. Therefore, we may take it

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that the plaintiff was to continue to receive payment for his services, and that Lowry was still to be regarded as the purchaser of the lands surveyed.

The second agreement reads: "Davis agrees with Lowry to divide equally with him (Lowry) all profits arising out of the disposal of the lands staked . . . expenses by Lowry to be deducted."

The plaintiff's contention is, that, by the second agreement, the $1 an acre payment was wiped out; and that, instead, he was to share with Lowry the profits to be made out of the lands when disposed of by Lowry.

The defendants, on the other hand, say that the "profits" referred to in the second agreement mean the profits that Davis would make in the deal between himself and Lowry, that is to say, that the agreement should read this way—Davis agrees with Lowry to divide equally with him (Lowry) all profits arising out of the disposal of the land by Davis to Lowry.

Is it reasonable to suppose that within half an hour of making a bargain whereby he was to receive at least 75 cents an acre clear, the plaintiff should, without any consideration, agree to give one half of his profits on the staking to Lowry? I should think not.

The word "disposal" seems inapplicable to the acquisition by Lowry of land staked by his employee Davis. The power of attorney helps the plaintiff's contention; but, on the other hand, there is the letter written by the plaintiff himself.

The defendants, in my opinion, are right on the construction of the two documents. But, as the plaintiff is to share in the profits arising from the acquisition of the land by Lowry, he is entitled to have an account and payment of the amounts due. As many payments of 50 cents per acre have been accepted by the Government, the action is not premature.

In my opinion, the learned trial Judge should not have dismissed the action, but should have ordered the pleadings to be amended so as to dispose of the case finally between the parties, declared the true meaning of the documents, and directed an account to be taken so as to settle the case for all time.

To quote the language of Knight-Bruce, L.J.: "It is of the utmost importance to the right administration of justice

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in these Courts, that it should be constantly borne in mind by them that by their very constitution they are to decide according to equity and good conscience; that the substance and merits of the case are to be kept constantly in view; that the substance and not the mere literal wording of the issues is to be regarded; and that if, by inadvertence, or other cause, the recorded issues do not enable the Court to try the whole case on the merits, an opportunity should be afforded by amendment, and if need be, by adjournment, for a decision of the real points in dispute."

See reasons for judgment of Hunter, C.J., in Belcher v. McDonald (1902), 9 B. C. R. at p. 388.

I would allow the appeal, amend the pleadings; fix the plaintiff with the costs thereof and of his failure at the trial; and declare that under the contract of the 26th August, 1909, the plaintiff and Lowry are entitled to share in the profits in the sale to Lowry of the land, and direct an account to be taken on that basis.

*Appeal dismissed;* IRVING, J.A., *dissenting.*

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## BRITISH COLUMBIA.

APRIL 2ND, 1912.

COURT OF APPEAL.

### ALBO v. GREAT NORTHERN R. W. CO.

*Railway—Carriage of Goods—Damage from Frost—Delay in Delivery — Evidence — Inference — Liability.*

Figs shipped from Italy to Fernie, British Columbia, were received by the defendants on the 24th December, 1909, at St. Paul, Minnesota, to be carried to their destination. They were kept in transit to Fernie until the 19th January, 1910, and, when delivered, were found to be frozen. The defendants gave no explanation of the delay, and offered no evidence as to the care taken to protect the goods from frost:—

*Held*, that the inference to be drawn was, that the figs were frozen while in the possession of the defendants; and they were liable.

Judgment of WILSON, Co.C.J., reversed.

Appeal by the plaintiffs from the judgment of WILSON, Co.C.J., dismissing an action for damages for injury to goods in the course of carriage.

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The appeal was heard by MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Davis, K.C., for the plaintiffs.

A. H. MacNeill, K.C., for the defendants.

MACDONALD, C.J.A.:—I do not find it necessary to decide the legal question which was raised in argument, nor to say whether or not Sutherland, who was the proprietor of the Oceanic Transit Company, the initial carrier, was the agent of the defendants. I prefer to rest my judgment entirely upon the fact, which is, to my mind, clearly established, that, on arrival of the figs at Fernie, they were then in a frozen condition. It was not a case of having been frosted, but the frost was actually in them at that time. They were received by the defendants the Great Northern Railway Company at St. Paul, on the 24th December, 1909, and were kept in transit to Fernie from that date until the 19th January, 1910. The defendants gave no explanation of what seems to me an unnecessarily long delay. In January the weather was very cold at Fernie. These figs were in the possession of the defendants for almost a month. The defendants offer no evidence at all as to the care taken to protect them against frost. In these circumstances, I have no difficulty in drawing the inference of fact that the figs were frozen while in the possession of the defendants. I say the defendants, because no distinction was made in argument between these two companies, which are operated, as I understand, as one concern.

I would allow the appeal; and, as it was conceded that, if the defendants were liable at all, they were liable for the full amount claimed, judgment should be entered below for that amount, with costs there and here.

IRVING, J.A.:—The bill of lading had, across its face, "Goods to be protected against frost." One of the conditions provided that any damage to goods for which the carrier is liable must be claimed against the company in whose actual custody the same may be at the time of the accident. The acceptance of these goods by the defendants at St. Paul was in effect a contract by the defendants to carry the goods on the terms stated in the original bill of lading.

It seems to me that the plaintiffs established a prima facie case against the defendants when they proved that the

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goods were frozen when delivered at Fernie on the 19th January, and that the defendants had the custody of them from the 21st December to the 19th January.

It became the duty of the defendants to shew that the goods were damaged when they took them over.

The letter of the 28th January, 1911, in my opinion, ought to be regarded as written without prejudice: see Pirie v. Wyld, 11 O. R. 422.

Hennell v. Davis, [1893] 1 Q. B. 367, is against the plaintiffs' contention that the defendants, by paying for the chestnuts, admitted their liability in respect of the figs.

I would allow the appeal.

GALLIHER, J.A.:—I think this appeal should be allowed.

I am not sure that Mr. Davis's contention that the payment of the $160 for the chestnuts, under the circumstances of this case, is an admission of the cause of action as to the balance of the claim, is not well founded; but, as I think the appeal should be allowed on another ground, I refrain from deciding that point.

The goods in question, which were shipped from Naples, Italy, were receipted for in good condition.

As the only damage to the goods complained of is by frost, the evidence as to the climate of Italy precludes the possibility of their being damaged in that way at the time of shipment.

The defendant company, the terminal carriers, received these goods at St. Paul, Minnesota, and receipted for them in apparent good order, with this limitation, if I may so term it, "Contents and condition of contents of packages unknown."

Under such circumstances, the weight of authority in the United States Courts seems to be that, when it is shewn that the goods are received by the first carrier as in good order, it will be presumed, in the absence of proof to the contrary, that they were in like good order when received by the (here defendant) company, and unless this be repelled by evidence (the onus of which is on the company) they will be held liable.

This seems to me, if I may say so, sound common sense.

Moreover, there is this further feature to be considered in the case at bar. These goods were on the road between St. Paul, Minnesota, and Fernie, B.C., between the 21st De-

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cember, 1909, and the 19th January, 1910, an unreasonable length of time, at a time when, during the month of January, the evidence is, that the weather was very cold.

The presumption is very strong that, if these goods were damaged by frost, it was during that interval.

I am quite satisfied (as the learned trial Judge appears to have been), that the figs were frozen, and the plaintiff was justified in refusing them.

At the trial the only evidence put in by the defendants was as to whether the figs were frozen or not.

The Ida, 32 L. T. N. S. 541, is distinguishable. There it was held that there was no proof of the condition of the cargo, when received at the point of shipment, and the defendants successfully met, in their evidence, every contention of the plaintiffs as to damage to the cargo while in transit.

*Appeal allowed.*

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## BRITISH COLUMBIA.

APRIL 2ND, 1912.

COURT OF APPEAL.

## ROOT v. VANCOUVER POWER CO.

*Master and Servant—Injury to Servant—Negligence—Evidence—Finding of Jury — Nonsuit — Workmen's Compensation Act.*

*Held*, affirming the judgment of GREGORY, J., dismissing the action, that, upon the evidence, it was impossible to fix liability upon the defendants for negligence by reason of the presence in their tunnel, where the plaintiff was employed as a mucker, of a piece of dynamite, into which the plaintiff stuck his pick and was injured.

*Semble*, a proper case for compensation under the Workmen's Compensation Act.

Appeal by the plaintiff from the judgment of GREGORY, J., dismissing the action, which was brought to recover damages for personal injuries sustained by the plaintiff by reason of the negligence of the defendants, as alleged, notwithstanding the verdict of the jury in favour of the plaintiff.

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The appeal was heard by MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

J. A. Russell, for the plaintiff.

L. G. McPhillips, K.C., for the defendants.

MACDONALD. C.J.A.:—The plaintiff was injured by an explosion of dynamite, into which, as I gather from the evidence, he stuck his pick while employed as a mucker in the defendants' tunnel. There is no proof of how the dynamite got there; whether or not it was a loose piece hidden by muck or silt washed there by the water which had been flowing through the tunnel for some days, or the charge of an unexploded hole, or an unexploded piece in the end of a hole, called in mining parlance a "cut-off," no one can tell. That this dynamite could have been discovered by the most careful inspection or by counting the explosions at time of blasting, is not shewn. It was impossible to fix responsibilty for negligence upon the defendants on the evidence in this case; and it, therefore, follows that the judgment below dismissing the action must be sustained.

In view of the evidence, it seems to me a pity that the plaintiff did not elect to take compensation under the Workmen's Compensation Act; and I venture to express the hope that the defendants will yet do what they offered to do in the beginning—pay such compensation.

IRVING, J.A.:—Juries are not at liberty to find a verdict in favour of a plaintiff upon any statement of facts which they may think are decisive of the question. They must pass upon the state of facts put forward at the trial, and passed upon by the Judge as being sufficient for them to base a decision upon.

Assuming that no inspection was in fact made, the ground the jury went on would have been met by the doctrine of fellow-servant. The evidence is uncontradicted that Peterson told the night shift boss, Barney, to make an inspection, and inspections were as a rule made.

We have had this "defective system" before us many times. It is the master's duty to take reasonable care of his employees by associating them with persons of ordinary care and skill, and superintendents competent to discharge their duties. If these men, brother workmen or superintendents, make a slip, and harm in consequence is occasioned

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to one of the men, that is not proof of a defective system. It is not the fault of the master that caused the injury. It is the negligence of the fellow-worker, and there is no reason why the injured man should not proceed against his fellow-workman: Lees v. Dunkerly Bros., [1891] A. C. 5, but the negligence of the fellow-servant gives him no cause of action against the master. Here we get back to Priestly v. Fowler, decided in 1837, 3 M. & W. 1.

The ground selected by the jury will not support a finding of negligence; and, therefore, the verdict cannot stand,

The case of Miller v. Kaufman (1911), 2 O. W. N. 925, 1493, 18 O. W. R. 915, 19 O. W. R. 881, was cited to us as an authority for the proposition that we should order a new trial as the proper remedy.

We should, in my opinion, discourage new trials as much as possible; and I do not think we should assume in this case that the jury was stupid—that was the trouble in Miller v. Kaufman.

Mr. Russell refers us to McArthur v. Dominion Cartridge Co., [1905] A. C. 72. There it was shewn that the cartridges were, owing to a fault in the working of the automatic machine, turned upside down, so that a blow, intended to fall on top of the cartridge, sometimes fell on the metal end of the cartridge, in which the primer or percussion cap was contained. It was not an unreasonable inference to draw that the explosion was caused in that way, and then it was shewn that the explosion would or might have been comparatively harmless if the outside box which "back fired" had been left as it had been originally constructed.

This case is quite different. Here we know the cause. It was the pick striking the dynamite; but how or when did the dynamite get there? The defendants can only be responsible if they were negligent in respect of its being there, and on the plaintiff's own case, the negligent system was not proved, nor was anything proved inconsistent with the theory that the dynamite might have got there owing toe carelessness of a fellow-workman. In fact it was too equivocal to constitute a case to go to the jury.

GALLIHER, J.A.:—I would dismiss the appeal.

This seems to me to have been essentially a case for relief under the Workmen's Compensation Act.

*Appeal dismissed.*

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## SUPREME COURT OF CANADA.

FEBRUARY 20TH, 1912.

### McKILLOP AND BENJAFIELD v. ALEXANDER.

*Land Titles Act—6 Edw. VII. ch. 24 (Sask.)—Priority—Registration—Caveat — Notice—Construction of Statute —Equities between Purchasers—Assignment of Contract —Conditions — Right Enforceable against Registered Owner—Vendor and Purchaser.*

Under the provisions of the Saskatchewan Land Titles Act. 6 Edw. VII. ch. 24, the lodging of a caveat in the land titles office in which the title to the lands in question is registered, prevents the acquisition of any legal or equitable interest in the lands adverse to or in derogation of the claim of the caveator.

A company, being registered owner of lands under the Act, entered into a written agreement to sell them to P., who assigned his interest in the contract to G., who then agreed to transfer his equitable interest, thus acquired, to A. Subsequently, without knowledge of A.'s interest, McK. and B. acquired a like interest from G. A caveat claiming an interest in the lands was then lodged by A., in the proper land titles office, and, without inquiry or actual notice of the registration of the caveat, McK. and B. afterwards obtained the approval of the company to the assignment which had been made to them.

In an action for specific performance:—

*Held, per* DAVIES, IDINGTON, ANGLIN, and BRODEUR, JJ., that, as the purchasers from G. were on equal terms as to equities, A. had priority in point of time, at the date when his caveat was lodged; that such priority had been preserved by the registration of the caveat, and the subsequent advantage which would otherwise have been secured by the company's approval of the assignment to McK. and B. was postponed to any equitable right which A. might have to a conveyance.

Also, *per* IDINGTON, J., that, irrespective of the lodging of the caveat, A. had a prior equity to the subsequent assignees.

The agreement by the company provided that no assignment of the contract should be valid, unless it was for the whole of the purchaser's interest, and was approved by the company, and also that the assignee should become bound to discharge all the obligations of the purchaser towards the company. Until the time of the approval of the assignment to McK. and B., none of these conditions had been complied with.

*Held, per* DAVIES, IDINGTON, ANGLIN, and BRODEUR, JJ., that the conditions in restriction of such assignment of the original contract could be invoked only by the company.

*Held, per* DUFF, J., dissenting, that, as the rights of G. against the company had never become vested in A., according to the provisions of the contract, he had acquired no enforceable right against the company, the registered owners of the lands; and, consequently, he had no legal or equitable interest in them which could be protected by caveat.

Judgment of the Supreme Court of Saskatchewan, *Alexander* v. *Gesman*, 4 Sask. L. R. 111, 17 W. L. R. 184, affirmed; DUFF, J., dissenting.

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original action, from the judgment of the Supreme Court of Saskatchewan, Alexander v. Gesman, 4 Sask. L. R. 111, 17 W. L. R. 184, reversing the judgment of JOHNSTONE, J., 15 W. L. R. 261, and maintaining the plaintiff's action with costs.

The appeal was heard by DAVIES, IDINGTON, DUFF, ANGLIN, and BRODEUR, JJ.

J. S. Ewart, K.C., for the appellants.

F. H. Chrysler, K.C., for the respondent.

IDINGTON, J.:—The Canadian Northern Railway Company were registered owners of land under the "Torrens System," and gave to a subsidiary company, named the Canadian Northern Prairie Lands Company, the management of these lands.

The latter company, under powers thus given, sold a section to one Potter, who in turn sold it to one Gesman, and he, on the 2nd November, 1909, sold a half of the section to the respondent Alexander, who paid $100 cash, and was to pay the balance of what accrued due to Gesman in respect of his equity, for the selling company had not been paid their price.

Then on the 4th November, 1909, Gesman sold the same half section and the other half of the section to the appellants. Each of these transactions was reduced to writing, and was, so far as respects mere form, a valid contract.

On the 6th November aforesaid, the respondent Alexander executed a caveat setting forth his claims against the half-section he had so purchased, and registered the same on the 10th November aforesaid.

On the 14th December, 1909, Gesman was paid by the appellants the balance of the $1,800 purchase-money, and they received from him an assignment of the original agreement of sale from the Prairie Lands Company to Potter.

The Prairie Lands Company had given a written agreement in which there was a provision guarding against the recognition of sub-purchasers.

The assignments to Gesman and by him to the appellants were approved by the Prairie Lands Company on the 29th November, 1909. I shall hereafter refer to this feature of the case.

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The respondent began this action on the 21st February, 1910.

There is little, if any, dispute of fact.

By their respective agreements of sub-purchase the appellants and respondent Alexander each acquired an equitable interest in the lands.

Alexander invokes for his protection the maxim qui prior est tempore potior est jure.

It is an undoubted principle of law that, as between owners of equitable interests, the first in time prevails, unless he who has acquired it has either done or omitted to do something he is by law required to do, and thereby has lost this prior right.

Alexander had not done anything to taint his right; and, so far as I can see, omitted nothing he was required to do.

His registration of notice of his claim may not have been requisite, on the facts here presented, but was, if I understand the practice, exactly what is usually done by prudent purchasers under a time bargain.

And prudent buyers are well advised in making search for such notice of prior purchase. But, though alleged to be here notice to the subsequent purchasers, I desire not to express my opinion on that point; for, in my view of this case, that need not be considered merely from the point of view of notice.

An argument was presented by the appellants founded on the practice relative to the assignments of choses in action, in pursuance of which notices of the assignment thereof are given to the debtor or trustee of the fund provided for the discharge of the obligation in question in the assignment.

I do not think the argument is well founded. Indeed, the mass of authority against it seems overwhelming.

In the case of Taylor v. London and County Banking Co., [1901] 2 Ch. 231, at p. 254, in appeal, Stirling, L.J., states as follows: "Although a mortgage debt is a chose in action, yet, where the subject of the security is land, the mortgagee is treated as having 'an interest in land,' and priorities are governed by the rules applicable to interests in land, and not by the rules which apply to interests in personalty." He proceeds to quote from Sir William Grant in Jones v. Gibbons, 9 Ves. 407, at p. 410, and cites Wilmot

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v. Pike, 5 Hare 14. The authorities cited bear out his statement of the law, which is laid down to the same effect in Halsbury's Laws of England, vol. 13, p. 79, where other authorities are collected.

There is nothing in the case in hand of what sometimes happens when the party holding the subsequent equity has been able to fortify it by the acquisition of the legal estate or its equivalent—a declaration by him holding the legal estate that he so holds as trustee for him claiming.

Nor can I find anything in a minor suggestion made that the respondent purchaser should have possessed himself of the prior contracts or agreements on which his title of recognition must rest. The thing was impossible.

The next way it is put is, that the respondent should have had an indorsement on the contract of Gesman, or, perhaps, one on each contract all along the line to the company. Who ever heard of a sub-purchaser looking for such a thing? And there is no evidence that the appellants did so. No case is cited to support these remarkable propositions, save such cases as arise from mortgage by deposit of deeds or the like, where possession of the deeds is of the essence of the transaction.

Indeed, in transactions such as this, to require that would be, if not a manifest absurdity, most unusual. Nor can I find anything to distinguish, as against the respondent Alexander, the case of assignment of a mortgage from that of an assignment by a purchaser of land. Any distinction between them is in favour of Alexander, who in truth acquired an interest in the land, but not by way of security only, as a mortgagee does.

Dart in his work on Vendors and Purchasers, 5th ed., p. 837, in a section devoted to the subject, treats purchasers of equitable title as bound by the same rule.

In this case we have, then, the ownership registered in the name of the Canadian Northern Railway Company, who were holders of the certificate of title, and then the agreement of sale to Alexander, and notice thereof by the registration of his caveat founded thereon, and the holder of the certificated title acknowledging the authority of the Canadian Northern Prairie Lands Company to sell, and submitting its rights and duties to the direction of the Court. Can there be anything more to do than declare the equities between the other parties and direct accordingly?

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I agree with the reasoning of the judgment of the Court below, speaking through Mr. Justice Newlands, wherein he relies on secs. 136 and 139 of the Land Titles Act, now secs. 125 and 123. By accident it is in the judgment made to appear as if the first of these sections itself declared the effect, whereas it is the caveator who makes the claims, and the result is to render the acquisition of the legal estate by another impossible if the caveator's claim is rightly founded It is pointed out in argument here that the legal estate is not in question; but that does not dispose of the whole argument, for it only shifts the point and does not get rid of many reasons, beginning with the scope of these sections, and applying others in the same Act, which together tend to demonstrate that, considering, as in regard to interests in land we must, the equity of a purchaser filing a caveat, it must be held stronger than that of one who does not. I need not elaborate, for this case does not need it.

I still adhere to the views I expressed in the unreported case of Macleod v. Sawyer-Massey Co. (in 1910), noted in 14 W. L. R. 106 (affirming Sawyer-Massey Co. v. McLeod, 12 W. L. R. 249), that the clause in agreements of sale denying the right of any purchaser to assign, unless with the approval of the vendor, are, as between others, of no consequence.

They are designed to protect a vendor from annoying entanglements, and that, unless and until the vendor sets up for his own protection any of such stipulations in case of a claim made against or through him, no one else has a right to do so.

The appellants here try to present the approval in a somewhat different light from what was presented in the former case, by suggesting that, the first purchaser not having got approval, the second was entitled to assume that there was no prior purchaser.

This is a new contention, I gather from the judgments below, and we are not pointed to a line of evidence shewing that either ever searched or inquired at the company's land office.

Without such like evidence, there is, in my opinion, no foundation for such an argument. It was not until long after purchase that the appellants applied to and got the approval, in the vain hope that it might in some way help. Meantime, the respondent's caveat was entered, and he be-

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came entitled, indeed bound, to assert in Court his right, which could not be defeated by such contrivance; without at least the co-operation of the owner cancelling the original agreement, much less when the owner assumes the attitude it takes here of merely submitting to the direction of the Court.

I have referred to numerous authorities cited in the appellants' factum as if to support some argument to be derived therefrom, but fail to see their relevancy save to the point I have fully dealt with as to giving notice, and what I am about to refer to.

Two of these authorities are worthy of notice. Rice v. Rice, 2 Drew. 73, is a case where a vendor's lien existed, yet the purchaser got his assignment with receipt for purchase-money indorsed, and therewith got the title deeds, and by means thereof had, by depositing them and this assignment, raised a sum of money and absconded. In the face of such a clear equitable mortgage, induced by the very acts of the vendor claiming the lien, it was found possible to argue for the vendor's lien being prior. And why so? Because the position of lien prior in time is so strong as to encourage the hope of overcoming such a later title fortified as this was.

And in the case of Cave v. Cave, 15 Ch. D. 639, the rule set out in the maxim was followed after a full examination of Rice v. Rice, and Phillips v. Phillips, 4 De G. F. & J. 208, and the principles underlying them. I need not set forth the complicated facts of that case. Suffice it to say that there seems, to my mind, a great deal more in the facts there than in those here to tempt a Judge to discard the maxim; yet it was followed.

Here the man Gesman had in truth and law nothing to sell when he sold to the appellants.

It is only by a fiction, as it were, that we can refer to the second assignment, as an assignment at all. It can only become an assignment by virtue of some act or omission on the part of him holding the prior assignment that may raise an equity in him getting the second to have the man holding the first restrained from setting it up, and thus let the later one operate. How can the approval of the vendor, in ignorance of another assignment, have any such force as the statutory effect gives the first by virtue of the caveat and all it implies?

The appeal should be dismissed with costs.

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ANGLIN, J.:—The defendants McKillop and Benjafield appeal from the judgment of the Supreme Court of Saskatchewan en banc, reversing the judgment of Johnstone, J., who dismissed the plaintiff's action for specific performance, holding that the defendants, although subsequent purchasers, by their diligence in procuring an actual assignment of their immediate vendor's interest and the approval thereof by the original vendor, the railway company, in which the legal estate was vested, and by obtaining possession of the original contract of sale made by the company with such approval indorsed thereon, had acquired a position "much stronger in equity than that of the plaintiff," who "had nothing more than an agreement to assign."

The sale to the plaintiff was of one-half of the section purchased by his vendor; the sale to the defendant was of the whole section.

The Court en banc was of opinion that the registration by the plaintiff of a caveat in respect of his claim, prior to the defendants' completing their purchase and obtaining the assent of the original vendor to the assignment to them of the original vendee, prevented the defendants from acquiring any right or interest in the land except subject to the plaintiff's claim.

The facts of the case are briefly, but sufficiently, summarised by Newlands, J., as follows: "The plaintiff first obtained an equitable estate in the said half-section of land. Subsequently, but without notice of the plaintiff's equitable estate, the defendants McKillop and Benjafield also obtained an equitable estate in the said land. Before anything further was done by the said defendants, the plaintiff filed a caveat in the proper land title office against the said lands, after which the said defendants completed their purchase and had the assignment to them approved of by the owner of the legal estate."

Apart from the effect of the Land Titles Act of Saskatchewan (6 Edw. VII. ch. 24), and of the caveat lodged by the plaintiff pursuant to its provisions, I incline to the view that the defendants would have been entitled to succeed, because, although subsequent purchasers, they had the best right to call for a conveyance of the outstanding legal estate, and were, therefore, in equity entitled to its protection: Dart on Vendors and Purchasers, 7th ed., p. 845. They held this position, not because they had given notice of their pur-

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chase to the holder of the legal estate, which the plaintiff had omitted to do (Hopkins v. Hemsworth, [1898] 2 Ch. 347, nor because the plaintiff had omitted to have a note of his purchase indorsed on the original contract from the railway company, Jones v. Jones, 2 Sim. 633 (points much insisted on at bar), but because they had obtained the consent of the railway company to the assignment to them of their vendor's interest in the land. As a result of the original sale, the railway company became a trustee of the property for its purchaser, who in the eye of a court of equity was the real beneficial owner: Shaw v. Foster, L. R. 5 H. L. 321, at p. 338. The defendants were purchasers of his interest for value and without notice of the plaintiff's claim. They procured the railway company to become a party to the conveyance to them of that equitable interest by obtaining its consent to the assignment under which they claim. Although the company did not formally convey or declare a trust of the legal estate in favour of the defendants, its privity and consent to the assignment to them gave them a position which (apart always from the effect of the Land Titles Act and of the caveat lodged by the plaintiff under it) was such that a court of equity would not interfere to deprive them of the better right so obtained to call for the conveyance of the legal estate: Wilkes v. Bodington, 2 Vern. 599; Wilmot v. Pike, 5 Hare 14, at p. 22; Taylor v. London and County Banking Co., [1901] 2 Ch. 231, at pp. 262-3. The effect of this consent of the railway company on the defendants' rights is certainly not lessened by the presence in the company's original agreement for sale of the following special clause: "No assignment of this contract shall be valid unless the same shall be for the entire interest of the purchaser, and approved and countersigned on behalf of the company by a duly authorised person, and no agreement or conditions or relations between the purchaser and his assignee or any other person acquiring title or interest from or through the purchaser, shall preclude the company from the right to convey the premises to the purchaser, on the surrender of this agreement and the payment of the unpaid portion of the purchase-money which may be due hereunder, unless the assignment hereof be approved and countersigned by the said company as aforesaid."

But, before the defendants obtained the assent of the railway company, and when they had paid only $700 on ac-



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count of their purchase-money, and there was still $1,800 unpaid, the plaintiff lodged in the land titles office his caveat forbidding "the registration of any transfer or any instrument affecting" (the half-section in which he claimed an interest) "unless such instrument is expressed subject to my claim." The agreement for purchase held by the plaintiff was an "instrument," within the meaning of clause 11 of sec. 2 of the Land Titles Act. Under sec. 136, the plaintiff was entitled to lodge a caveat in respect of his interest under that agreement; and, when so lodged and while it remained in force, under sec. 139 the caveat had the effect of preventing the registrar from registering "any memorandum of any transfer or other instrument purporting to transfer, incumber, or otherwise deal with or affect the land in respect to which such caveat was lodged, except subject to the claim of the caveator."

That the caveat remained in force is not questioned. Although challenged on the ground that it did not shew the interest of the caveator, the caveat, in my opinion, sufficiently complied with the requirements of sec. 137. It stated the claim of the caveator to be as "the owner of the south half of section 1, in township 32, and range 15, west of the third meridian in the province of Saskatchewan, under and by virtue of an agreement for sale in writing of the said property to me from G. A. Gesman, of the city of DesMoines, in the State of Iowa, one of the United States of America, agent."

It did not give the number of the certificate of title, as prescribed in the form "W." But, in view of the complete description of the land which it contained, that was, in my opinion, unnecessary. The provision of sec. 137 should, I think, be regarded as directory and intended for the guidance of registrars: Wilkie v. Jellett, 2 Terr. L. R. 133, at p. 143, 26 S. C. R. 282, at p. 288. If a caveat enables the registrar to identify the land in respect of which it is lodged, and if the interest claimed is stated with reasonable certainty, he properly receives it, and, when duly lodged, it has the effect contemplated by the statute, although in some particular it should not be in strict compliance with the prescribed form.

A certificate of title to the land in question had been granted to the Canadian Northern Railway Company, Section 73 of the statute is as follows: "After a certificate of

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title has been granted for any land, no instrument until registered under this Act shall be effectual to pass any estate or interest in any (sic) land except a leasehold interest not exceeding three years or render such land liable as security for the payment of money." By sec. 74, it is provided that "upon the registration of any instrument . . . the estate, or interest specified therein shall pass;" and by sec. 80 it is enacted that "every instrument shall become operative according to the tenor and intent thereof, so soon as registered, and shall thereupon create, transfer, etc., the land, or estate or interest therein, mentioned in such instrument."

Under clause 11 of sec. 2, "instrument" means "any grant, etc., or any other document in writing relating to or affecting the transfer of or dealing with land or evidencing title thereto."

Under this definition, the contracts both of the plaintiff and of the defendants were "instruments." Neither of them created or transferred any interest under the Act, because unregistered. But the equitable interests or estates conferred by them would nevertheless be recognised and dealt with and would be enforced against the registered owner and others adverse in interest, in the exercise of the jurisdiction in personam of a court of equity: Re Massey and Gibson, 7 Man. L. R. 172. The plaintiff's caveat, from the time it was lodged, prevented the registration of any instrument except subject to his claim (sec. 139). Prima facie that means subject to his claim as it stood at the time when the caveat was lodged. At that time both the plaintiff and the defendant had equitable rights as purchasers. The plaintiff had an agreement for a sale to him, in respect of which he had paid $100 on account; the defendants had a like agreement, in respect of which they had paid $700 on account. Inasmuch as every conveyance of an equitable interest is innocent, the defendants not having at that time taken any steps which would entitle them to priority, or, which is the same thing, would entitle them to ask a court of equity not to interfere to deprive them of any acquired right to call for a conveyance of the legal estate, and the plaintiff not having done or omitted to do anything whereby his priority would be impaired or affected, the defendants' claim as purchasers was still subject to his prior equity in respect of the half-section bought by him. That the plaintiff's caveat, if it had been lodged only after the defendants had obtained the formal

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assignment of their vendor's contract and had procured the assent of the railway company thereo, would still have sufficed to entitle him to prevent the registration of the defendants as owners, under a conveyance to them from the railway company, seems to me improbable, inasmuch as, apart from the provisions of the Land Titles Act, the defendants would then have had a better right to call for the conveyance of the legal estate, and would in equity be entitled to the production of it against the plaintiff's prior equitable claim. But that question it is not now necessary to determine.

Whether a caveat duly lodged should be deemed notice is apparently an open question: General Finance Agency, etc., Co. v. Perpetual Executors and Trustees' Association, 27 Vict. L. R. 739, at p. 744. Whether the plaintiff's caveat was in the present case notice to the appellants, in view of the fact that before it was lodged they had already made their contract and paid part of their purchase-money, is, in the opinion of Newlands, J., open to considerable doubt. But, whatever its effect as notice (and I incline to the view that it must be deemed notice to every person who claims to have acquired, subsequently to its being lodged, any interest in the lands, or to have increased or bettered any such interest already held), inasmuch as it is the only means provided for the protection of unregistered interests, and it was obviously intended by the legislature thus to afford adequate and sufficient protection for them, I am of the opinion that a caveat, when properly lodged, prevents the acquisition or the bettering or increasing of any interest in the land, legal or equitable, adverse to or in derogation of the claim of the caveator—at all events, as it exists at the time when the caveat is lodged. This, in my opinion, is the necessary result of a fair construction of secs. 73, 74, 80, 81, 136, and 139 of the Land Titles Act. I would refer to General Finance Agency, etc., Co. v. Perpetual Executors and Trustees' Association, 27 Vict. L. R. 739, and Re Scanlan, 3 Queensland Law Jour. 43.

Moreover, as a document affecting the transfer of land, a caveat is an "instrument;" and sec. 81 provides that "instruments registered in respect of or affecting the same land shall be entitled to priority the one over the other according to the time of registration and not according to the date of execution."

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It was, I think, incumbent upon the defendants McKillop and Benjafield, before completing their purchase, to ascertain that no caveat had been lodged against the land; and, in default of their having done so, they cannot complain if the prior equity of the plaintiff, protected by his caveat, is held to be paramount. As put by Lilley, C.J., in Re Scanlan, it is a "plain practical precaution for a purchaser . . . to ascertain that there is no caveat (in the registry) before he pays his purchase-money. . . . People cannot learn too soon that dealings outside, and without reference to the registry, are hazardous."

The judgment for specific performance against the defendants Gesman and McKillop and Benjafield appears to be unimpeachable. The Canadian Northern Railway Company, having submitted their rights to the Court, may be taken to have waived any right which they might have had to refuse to approve of or recognise the assignment from Gesman to the plaintiff. Since they do not set up against the plaintiff the special clause in their agreement above quoted, their co-defendants cannot do so. The judgment for specific performance as against the company would, therefore, appear to have been quite proper. I express no opinion as to what the result should have been, if, in answer to the action, the railway company had pleaded and relied upon the special clause referred to and the exercise of any discretion which it conferred upon them.

For these reasons, I would dismiss this appeal with costs.

DAVIES and BRODEUR, JJ., concurred in the opinion expressed by ANGLIN, J.

DUFF, J. (dissenting):—On the 28th February, 1906, the Canadian Northern Railway Company (acting through the Canadian Northern Prairie Lands Company) agreed by two several agreements to sell to one Potter the two quarter-sections forming the south half of section 1 in township 32 and range 15 west of the third meridian in the province of Saskatchewan. Before the whole of the purchase-price was paid, Potter assigned his rights under these agreements to one Gesman, who in turn, on the 2nd November, 1909, agreed with the respondent Alexander (the plaintiff in the action out of which this appeal arises) to assign his rights to Alexander. On the 4th day of the same month, Gesman

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agreed with the appellants to assign the same rights to them. On the 10th November, Alexander filed a caveat forbidding any transfer of the lands in question; and on the 29th of that month the assignment from Gesman to the appellants was completed; and on the 15th December the consideration was fully paid. In February, 1910, Alexander brought his action, in which he claimed specific performance of his agreement with Gesman, and in which he also prayed for an order directing the appellants and the Canadian Northern Railway Company to execute a proper conveyance to him of the lands that were the subject of these various dealings. The trial Judge dismissed the action. The full Court reversed this judgment, on the ground that, while the appellants had the better equitable rights to a conveyance from the company, the respondent Alexander, by filing his caveat, had gained priority.

I agree with the full Court that the respondent must succeed (if at all) on the ground upon which their judgment proceeded; and, consequently, in my opinion, the appeal ultimately turns upon one's view of the effect to be attributed the the filing of Alexander's caveat. But, in order to reach a proper appreciation of the effect of that proceeding, it is necessary, I think, to examine with care the rights of the parties under the agreements through which they respectively claim.

The agreements between the Canadian Northern Railway Company and Potter are both in the same form, were executed upon the same day, and may for the purposes of this case be considered as if they had been one agreement embodied in one instead of two formal instruments. The purchase-money (over and above a certain sum that was paid in cash) was to be paid in five annual instalments, the last of these instalments being due the 28th February, 1911. The agreement contemplates and makes careful provision for the assignment of the purchaser's rights; and it will be necessary to dwell a little upon the effect of the stipulations upon this subject, as they appear to me to be a governing ingredient in the considerations which determine the relative priority of the claims upon which we have to pass. The stipulations on the part of the purchaser are formally declared by the instrument to be binding upon his assigns; and the instrument further contains this clause: "No assignment of this contract shall be valid unless the same shall be for the entire

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interest of the purchaser, and approved and countersigned on behalf of the company by a duly authorised person, and no agreement or conditions or relations between the purchaser and his assignee, or any other person acquiring title or interest from or through the purchaser, shall preclude the company from the right to convey the premises to the purchaser, on the surrender of this agreement and the payment of the unpaid portion of the purchase-money which may be due hereunder, unless the assignment hereof be approved and countersigned by the said company as aforesaid. But no assignment shall in any way relieve or discharge the purchaser from liability to perform the covenants and pay the moneys herein provided to be performed and paid."

By these provisions, it seems to me, the parties have expressed their intention to give to the obligations of the company under the agreement the character of rights which should be personal to the contracting parties to the extent at least that they should be enforceable against the company only by the purchaser or his representatives or by such persons as, with the consent of the company, should become invested with the purchaser's rights and should become bound to assume his obligations under the agreement. "No assignment shall be valid unless the same shall be for the entire interest of the purchaser." That is to say, the purchaser cannot validly make any partial disposition of his rights; he cannot merely charge them, he cannot attach sub-equities to them; he can only affect them by a disposition which wholly divests him of them and vests them in an assignee who is substituted as purchaser for him. No assignment, moreover, though satisfying this condition, can take effect until it has been assented to by the vendors, until the vendors, that is to say, have accepted and approved of the assignee. The purchaser under such a contract stands, of course, in a position very different from that of a vendee of land under a contract of sale which is in the ordinary form and contains no such stipulation. A purchaser, under such a contract, may multiply sub-equities to any extent he pleases, and the holders of such sub-equities again may each in his turn repeat the same process indefinitely. Where lands are sold under terms by which the payment of the purchase-money is deferred for a considerable period, during which the contract remains in fieri, it is obvious that such sub-equities may become a source of embarrassment to the ven-

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dor; and it is, doubtless, in part with the object of escaping such embarrassments that railway companies (holding large areas of land for the purpose of sale only, and having, of course, in respect of such lands, a very great number of dealings) customarily introduce this clause into the form of contract which they commonly use when small parcels of lands are sold upon credit.

But, while the clause is thus beneficial to the company, it is of even greater value to the purchaser and his assignee. The assignee whose assignment has been accepted gets the advantage of being placed in direct contractual relations with the vendor and being freed from the necessity of concerning himself about possible equities created by the purchaser in the meantime; and, as to the purchaser (who cannot, of course, get a registered title so long as the purchase-money remains unpaid), the advantage to him of being enabled to transfer to a sub-purchaser an unimpeachable title to his rights, is obvious.

That the assignee under an approved assignment does get such a title (I am, of course, assuming now that the assignee is free from any imputation of mala fides) is sufficiently apparent.

It is manifest that the assignment contemplated and provided for by the agreement is intended to result, when accepted by the company, in a new agreement between the company and the assignee. By the express terms of the contract, the obligations of the purchaser are declared to bind his assignees; and the assignee, in presenting his assignment for approval, undertakes, of course, to submit to this as well as the other terms of the contract. The company, on the other hand, comes under an obligation to the assignee to perform on its part the contract of sale—whether because of an implied undertaking with the assignee arising out of the acceptance of the assignment, or ipso jure in consequence of the assignment vesting in him the purchaser's rights, is immaterial. The original purchaser is not relieved from responsibility under his covenants; but the effect of the transaction is, that the assignee is introduced as a party to the contract of sale; and under the contract so reconstituted the assignee is entitled to the rights and assumes the primary burden of the correlative obligations of the purchaser, as those rights and obligations are therein declared. Now, one of the terms of the original contract is, as we have

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seen, that no rights under it shall be acquired through any disposition by the purchaser, unless such disposition complies with conditions which are only fulfilled by the assignment to the accepted assignee; and, consequently, nobody claiming rights under the contract through any disposition by the purchaser (whose rights obviously cannot be constituted in defiance of the express terms of the contract itself upon which they are founded) can dispute the title of the accepted assignee to the benefit of the purchaser's rights. The company, in a word, by its acceptance of the assignment becomes a trustee of the land for the purposes defined by the terms of the contract thereby constituted; and, according to those terms, the land is to pass to the assignee on the performance of the conditions defined. It is argued that the provisions we have been considering are for the benefit of the vendor alone, and that he alone can take the benefit and claim the protection of them. It would be sufficient to say that such a proposition, applied to the facts of this case, means, in the last analysis, that the company, being under no legal disability to carry out its contract with the assignee, may lawfully refuse to do so, for it is perfectly obvious that, appreciating the rights of the parties as rights governed by the contract alone, the company is legally bound to convey this property to the appellants, and is under no sort of legal duty or obligation to Alexander, which creates an impediment in any way to its doing so. The contention, moreover, overlooks the circumstance that a new contract has been formed by which the assignees have come under obligations to the company. In entering into that relation, the assignees were entitled to rely on this provision. They were entitled to rely upon it, because it was one of the terms of the contract to which it was proposed that they should become parties; and it was obviously as much for their benefit as for that of the company; and it is to be presumed that they did rely upon it. As against parties to the contract or persons claiming under the contract, either directly or indirectly, they are indisputably entitled to any protection which that provision may afford.

Indeed, as I have pointed out, it is an unwarrantable assumption to say that this clause was originally framed exclusively in the interests of the company. It is obviously to the interest of all parties that sub-purchasers under such an agreement shall be able to pay their purchase-money

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with perfect confidence in the title they are acquiring; and, on an unsophisticated reading of it, it is manifest that one of the main objects of this clause is to secure to the sub-purchaser an unimpeachable title as against the vendors. That being so, it is impossible to argue that the sub-purchaser is not entitled to the benefit of it or that his rights under it can be neutralised by any action of another party to the contract.

From all this it is manifest that the respondent Alexander cannot succeed in this action, unless there is some other fact or circumstance, in addition to his agreement with Gesman, which gives him some right of action against the company or the appellants. That he has no right of action against the company is clear; and it is clear also, as a result of the special terms of the agreement, that he can succeed against the appellants only by establishing that he is entitled to have the rights vested in them exercised for his benefit—that the appellants, in a word, are trustees of their rights for him. The contention on behalf of Alexander is, that such a trust arises on one of these grounds: first, that his caveat bound Gesman's interest under the agreement for sale from the time it was filed, and that the appellants took that interest charged with an obligation to carry out Gesman's contract with Alexander; second, that the caveat was, in law, notice to the appellants of Gesman's contract with Alexander, and that they consequently must be held to have acquired Gesman's interest with notice of Gesman's breach of trust; and third, that the appellants' failure to search the register before paying the purchase-money to Gesman was such negligence as to deprive them of the benefit of their legal position under the contract or to require the Court to impute to them constructive notice of the facts stated in the caveat, which, of course, would have been ascertained if the register had been examined.

The first and second of these contentions are, I think, based upon a misconception of the purpose for which the machinery of caveats was devised by the authors of this Act. The fundamental principle of the system of conveyancing established by this and like enactments is, that title to land and interests in land are to depend upon registration by a public officer, and not upon the effect of transactions inter partes. The Act, at the same time, recognises unregistered rights respecting land, confirms the jurisdiction

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of the Courts in respect of such rights, and, furthermore, makes provision—by the machinery of the caveat— for protecting such rights without resort to the Courts. This machinery, however, was designed for the protection of rights, and not for the creation of rights. A caveat prevents any disposition of his title by the registered proprietor, in derogation of the caveator's claim, until that claim has been satisfied or disposed of; but the caveator's claim must stand or fall on its own merits. If the caveator has no right enforceable against the registered owner which entitles him to restrain the alienation of the owner's title, then the caveat itself cannot and does not impose any burden on the registered title. Alexander's caveat, consequently, conferred no right upon him; it could operate only to protect such rights as he had and could enforce against the land, that is to say, against the registered owner of the land. It is quite clear, as I have pointed out, that he had no such rights; and the filing of the caveat, therefore, was a wrongful interference with the proprietary rights of the company, for which Alexander might have been answerable in damages if the company had sustained any loss in consequence of it. It seems equally clear that the caveat could not affect the appellants as bringing home to them notice of the transaction between Alexander and Gesman. The statute does not say that the caveat shall operate as notice of the facts stated in it to intending purchasers; and there is not anything in the statute giving the least ground or colour for attributing to it any such operation. If an intending purchaser chooses to close his purchase by paying his purchase-money without first acquiring a registered title, he runs the risk of finding that he cannot get a registered title until some unregistered claim has been satisfied or some unregistered interest acquired. But he incurs this risk not because he is deemed to have had notice of the claim, and for that reason to be bound in good faith to recognise it, but because he can acquire a title only by registration; and registration he cannot have free from an enforceable claim against the registered title, in face of a caveat founded upon such a claim, until that claim has been satisfied, or the superiority of his claim has been established.

Section 173 of the Act, when read together with the provisions respecting caveats, would seem to establish beyond controversy that this view of the effect of a caveat

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correctly interprets the intention of the statute. "No person," the section reads, contracting or dealing with . . . owner of land for which a certificate of title has been granted shall, except in case of fraud by such person . . . be affected by any trust or unregistered interest in land, any rule of law or equity to the contrary notwithstanding."

It would seem strange if, after this formal declaration, the legislature had proceeded to provide a statutory method of affecting the conscience of the purchaser with notice of unregistered interests. The assumption that the legislature has provided such a method in the system of caveats seems to be unwarrantable. The operation of the caveat according to the design of the Act (as affecting a purchaser) is, I think, aptly expressed in Lord Redesdale's language in Underwood v. Lord Courtown, 2 Sch. & L. 41, at p. 66; it is to "bind his title not his conscience."

The third ground of relief is put in this way. Alexander, it is said, had an equitable right which was prior in time to the equitable right of the appellants, and the subsequent right of the appellants ought not to be permitted to displace his prior right: first, because the appellants, in failing to search for caveats before closing their purchase from Gesman, were guilty of such gross negligence as to make it inequitable to permit them to retain the advantage arising from their contract with the company; or second, because the appellants, by reason of their neglect to search the register, had constructive notice of Alexander's claim.

To the first of these contentions, there is an objection which seems to me to be absolutely fatal, and it is this. The maxim qui prior est tempore potior est jure is (as a great Equity Judge, Turner, L.J., said, in Cory v. Eyre, 1 De G. J. & S. 149, at p. 167), "founded . . . on this principle, that the creation or declaration of a trust vests an estate and interest in the subject-matter of the trust in the person in whose favour the trust is created or declared. Where, therefore, it is sought, . . . to postpone an equitable title created by declaration of trust, there is an estate or interest to be displaced. No doubt, there may be cases so strong as to justify this being done, but there can be as little doubt that a strong case must be required to justify it."

Lord Westbury explains the maxim in the celebrated case of Phillips v. Phillips, 4 DeG. F. & J. 208, in language

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which is to the same effect. The maxim has never been applied in favour of persons who have, neither by themselves nor by those whose rights they are asserting, had any legal or equitable interest in the land which was the subject of the dispute.

It is clear, as I have said, that Alexander never acquired any right which he could compel the registered owner to recognise; and, therefore, he never had a right which in any lawyerly use of the words could be described as an interest in land. His right was and remained a personal right against Gesman—enforceable, no doubt, by equitable remedies, both against Gesman and against others who might be implicated in Gesman's breach of faith—but still only a personal right because of the special provisions of the contract with the company under which Alexander could acquire no claim against the registered proprietors until they had assented to his assignment. It is argued that Gesman was the owner of the land in equity; but this seems really to be an abuse of language: see Fry, Specific Performance, p. 675, sec. 1382; and Ridout v. Fowler, [1904] 1 Ch. at pp. 661 and 662, per Farwell, J.

The company, it may be admitted, was a trustee in a limited sense. It is inaccurate to say that the company held the land in trust for the purpose of fulfilling the agreement of sale. But, as I have pointed out, that trust is defined by the agreement; and only those can in any admissible sense of the words be said to have acquired a beneficial interest in the land who have acquired, or, in other words, are entitled to enforce, some rights under the agreement. In this Alexander fails; his right (in the sense indicated), though in process of consummation, was never consummated. The wrong done him by Gesman was not to aid in defeating an unregistered right in the land (or against its registered owner) already constituted, but in preventing Alexander from constituting such a right by effectively transferring to the appellants the rights he had agreed to vest in Alexander. If the appellants were implicated in this wrong, the Court would find a means of making them account for what they acquired by means of it. But that must at least involve finding in them either guilty knowledge or guilty ignorance of Gesman's wrongdoing—neither of which is suggested.

The contention, moreover, fails because there is no adequate ground for imputing any such misconduct or neg-

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ligence to the appellants as would justify the Court in holding them accountable as trustees for Alexander.

The test to be applied is stated by Lindley, M.R., in Oliver v. Hinton, [1899] 2 Ch. at p. 274: "To deprive a purchaser for value without notice of a prior incumbrance of the protection of the legal estate, it is not, in my opinion, essential that he should have been guilty of fraud; it is sufficient that he has been guilty of such gross negligence as would render it unjust to deprive the prior incumbrancer of his priority."

It may be observed in passing that Lindley, L.J., is not here dealing with constructive notice; he is assuming an absence of notice, either actual or constructive; and, even in the absence of notice, the case from which this observation is taken decides that gross negligence such as a failure to require the production of the title deeds may deprive even a purchaser for value without notice, of the right to retain his legal advantage, whatever it may be, to the disadvantage of the holder of a prior equitable interest. I have pointed out that Alexander is not the holder of such an interest—but, putting aside that objection, we come to consider whether the appellants' negligence (so called), in failing to examine the register, is of the kind or degree which Lindley, L.J., had in view.

I should say, before proceeding to apply this doctrine to the facts, that I think it is doubtful whether the doctrine is one which can safely or properly be applied to impeach the rights of a purchaser contracting directly with a registered owner under the Act. I think there is something to be said in favour of the view that it cannot be applied consistently with the objects to be obtained by registration of title, and that the design of the Act is, that, as against a purchaser, unregistered interests should depend for their protection upon caveats operating directly to bind the title of the registered proprietor. Doctrines developed under the old system of conveyancing for the protection of equitable rights ought, no doubt, to be applied very guardedly for the purpose of deciding controversies respecting unregistered interests in registered land; and the utmost vigilance ought to be observed to avoid the mistake of yielding a punctilious allegiance to the letter of a rule evolved under widely different conditions, without determining to what extent the principle which underlies the rule is, in the circumstances, properly

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able. If I am right in the opinion I have expressed as to the effect of the appellants' contract with the company, it is perfectly clear that negligence cannot be imputed to him because of his failure to make inquiries respecting dealings of Gesman. Gesman produced his agreement with the company, and the assignment approved; and the appellants were entitled to rely upon that. A cautious or suspicious man might have done more, but they were not bound to be suspicious, and they are not to lose their legal rights because they might by "prudent caution" (to use Lord Cranworth's phrase in Ware v. Egmont, 3 D. M. & G. 460, at p. 473, have obtained more information than they did, unless they have been guilty of "gross and culpable negligence." As Lord Selborne said in Agra Bank v. Barris, L. R. 7 H. L. at p. 157, the purchaser owes no duty to the "possible holder of a latent title" to exercise care with regard to the title of his vendor. A purchaser is under no legal obligation to investigate his vendor's title: Bailey v. Barnes, [1894] 1 Ch. 25, at p. 35. The only relevant question is, were the assignees (from the point of view exclusively of their own interests) guilty of "gross and culpable negligence" in not examining the register? As regards the absence of concern respecting dealings by Gesman—which could not affect him—the point seems clear; it is only "by falling into the error attributed to those who are wise after the event" (see per Lindley, L. J., in Bailey v. Barnes, [1894] 1 Ch. 25, at p. 34), that one could charge the appellant with negligence in that respect.

Then, can it be fairly said that, in view of possible dealings by the company itself, their failure to search was "gross and culpable negligence?"

It is quite clear that a purchaser acquiring property in the ordinary way, under an arrangement such as that entered into by Porter with a great railway company, cannot avoid such risks as there may be in the possibility of fraud by the company with which he deals. No amount of vigilance on his part could, for example, prevent the ultimate registration of a transfer in course of transmission to the registry at the moment of the execution of his agreement for purchase. In the absence of fraud, however, there is no risk; and suffice it to say, that in such purchases the possibility of such frauds does not enter into the calculations of purchasers, unless at

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least they are abnormally given to suspicion. It, in my judgment, would be laying down a rule utterly at variance with the habits and modes of thought of people who engage in such transactions, to hold that it was gross and culpable negligence or indeed negligence in any degree for a purchaser in such a transaction to act upon the assumption that the company's good faith could be relied upon with absolute confidence. I think, for these reasons, that the suggestion that there was negligence of such a character as to be material here is utterly baseless.

As to constructive notice, I am inclined to think that, as regards the purchaser's dealing with the registered owner, the doctrine has been swept away by sec. 173 of the Act, and that the protection for unregistered interest substituted for it is the filing of caveats. As regards titles completed by registration, it clearly has no place in the scheme of the Act. I am aware that in the Australasian Courts, the first of these propositions appears to have been doubted; but I have seen no case in which the decision depended in any way upon a recognition of the doctrine as applicable to determine the rights of a purchaser from a registered owner. Knowledge and notice, of course, must often present themselves as ingredients in fraud, or in the facts from which fraud may be inferred, or in the circumstances giving rise to an estoppel or an equity of some description affecting the relative priorities of unregistered claims; but notice of an unregistered right or interest in itself cannot, I think, affect the right of a purchaser dealing bona fide with a registered owner.

There is no necessary analogy between the position of a proposed purchaser dealing with a registered proprietor of land under a system of title by registration, and the position of a purchaser of land where no such system exists. In the course of centuries an elaborate system of rules has been developed touching the proof of title which such a purchaser is entitled to demand from his vendor, and the practice of conveyancers points out the course a prudent solicitor will follow in order to protect the purchaser's rights. It was to avoid the delay, the uncertainty, and the expense attendant upon the investigation of titles that the system of title by registration was devised; and one of the most fruitful sources of uncertainty and expense which the authors of this system designed to clear out of the way, was this doctrine of constructive notice. See Report of Commissioners on Registration, 1857, Hogg, pp. 8 and 26.

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Not the least of the difficulties attending upon the application of the doctrine of constructive notice has always been the vagueness of the doctrine itself. "Every one who has attempted to define the doctrine of constructive notice has declared his inability to satisfy himself," said Lord St. Leonards in the 14th edition of his work on Vendors and Purchasers. An attempted definition, inserted in a bill introduced by that great property lawyer in 1862, proved to be so unsatisfactory that it was struck out with the consent of the author of the bill. Again and again eminent Judges in both common law and equity Courts have declared that the doctrine has been carried too far and is not to be extended. In English and Scottish Mercantile Investment Co. v. Brunton, [1892] 2 Q. B. at p. 708, Lord Esher, M.R., said: "In a series of cases Lords Cottenham, Lyndhurst, and Cranworth, Lord Justice Turner, and the late Master of the Rolls, Sir George Jessel, have said that the doctrine ought not to be extended one bit farther; all the Judges seem to have agreed upon that. In Allen v. Seckham, 11 Ch. D. 790, I pointed out that the doctrine is a dangerous one. It is contrary to the truth. It is wholly founded on the assumption that a man does not know the facts; and yet it is said that constructively he does know them." Bowen and Kay, L.JJ., accepted this view. In The "Birnam Wood," [1907] P. at p. 14, Farwell, L.J., said: "The Courts have of late years been unwilling to apply the principle of constructive notice so as to fix companies or persons with knowledge of facts of which they had no knowledge whatever."

And in the last edition of Dart on Vendors and Purchasers, p. 902, it is stated that "the tendency is to restrict the doctrine of constructive notice so far as is compatible with the rules of the Court applicable to fraud."

In the latest decision of the Court of Appeal dealing with the subject, the view expressed by Lindley, L.J., is, that the doctrine comes into play only when there are facts justifying an inference of knowledge or circumstances indicative of wilful ignorance.

It is not necessary to decide whether or not the doctrine has any application in this case; because, if I am right in the view I have just expressed, that the facts do not warrant any imputation of gross negligence, à fortiori they do not support an imputation of fraud or of that wilful departure from the usual course of business "in order to avoid



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acquiring a knowledge of a vendor's title" or that "wilful ignorance of defects" which, according to the view expressed by Lindley, L.J., in the case just referred to (Bailey v. Barnes), it would be necessary to shew in order to impute constructive notice to the appellants. As Lindley, L.J., said in that case "the doctrine of constructive notice," i.e., as expounded in his judgment, "is designed to prevent frauds on owners of property; but the doctrine must not be carried to such an extent as to defeat honest purchasers; and, although this limitation has sometimes been lost sight of, still the limitation is as important and is as well known as the doctrine itself."

*Appeal dismissed;* DUFF, J., *dissenting.*

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## BRITISH COLUMBIA.

APRIL 2ND, 1912.

COURT OF APPEAL.

## PERIARD v. BERGERON.

*Contract—Sale of Goods at Figures Based on Invoice Prices —Non-production of Invoices—Justification for Breach —Waiver.*

In an action for damages for the defendants' failure to complete the purchase of a stock of goods, in accordance with a written agreement, at a price to be fixed at a certain advance upon the "invoice price:"—

*Held*, that the contract contemplated that the invoices should be produced by the plaintiff, and the non-production justified the defendants in being off the bargain; MACDONALD, C.J.A., dissenting, upon the ground that, upon the evidence, the production of the invoices was waived at the time of the stock-taking, and the non-production was afterwards seized upon as a pretext for declining to carry out the contract.

Judgment of MORRISON, J., affirmed.

Appeal by the plaintiff from the judgment of MORRISON, J., dismissing the action, which was brought to recover damages for the breach by the defendants of an agreement to buy the plaintiff's stock of men's furnishing goods at $1.10 on the dollar invoice price. The defendants withdrew from the bargain, and attempted to justify their withdrawal on the ground that the plaintiff had not produced all his invoices.

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The appeal was heard by MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Ritchie, K.C., for the plaintiff.

J. A. Russell, for the defendants.

IRVING, J.A.:—I would dismiss this appeal.

The plain meaning of the words "invoice price" in the contract was the amount which Periard had been charged when he bought the goods.

The contract contemplated that these invoices should be produced, so that, after stock had been taken, the total price payable could be ascertained. This conclusion, I think, can be reached without the assistance of any evidence. We are entitled to take into consideration well-known mercantile practices in reading a commercial agreement.

The non-production of these invoices, in the circumstances, supports, in my opinion, the conclusion of the learned trial Judge that the plaintiff was not acting honestly.

GALLIHER, J.A.:—I am unable to say that the learned trial Judge came to a wrong conclusion, and would dismiss the appeal.

MACDONALD, C.J.A. (dissenting):—This action arose out of the sale of a stock of men's furnishing goods under a written agreement, whereby the defendants agreed to pay "$1.10 on the dollar invoice price," which was afterwards increased by three cents. When the parties came to take an inventory of the stock, disputes arose with respect to the price of certain articles, and in many cases the plaintiff was unable to produce invoices. I do not find it necessary to decide whether or not the defendants were at liberty to withdraw from the contract if and when invoices were not forthcoming. They did not withdraw, but attempted to adjust their differences at the time. I think the evidence is convincing that these differences were adjusted before the prices were put in the inventory; and that, when the stock-taking was completed, no complaint or declaration was made by the defendants that they would reopen the matter for further proof of invoice prices. As this is an appeal on the facts, and as the learned trial Judge has accepted the evidence of Mr. French, who was agent for and whose firm was backing the defendants financially in this matter, it becomes necessary to examine

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how far Mr. French's evidence is in conflict, if at all, with the evidence given on behalf of the plaintiff. I may say at the outset that the evidence of Miss Periard and A. J. Periard, and the other witnesses called on the plaintiff's behalf, impresses me favourably. They gave a fair and lucid statement of the manner in which the stock was taken and the inventory made up and completed. On the other hand, I am not impressed with the evidence or conduct of either of the defendants. The defendant Bergeron was employed as a salesman in the business for a month. This was in accordance with the agreement and prior to the taking of the stock. In this way he became familiar with the cost marks on the goods, but he was discharged from his position because he was surreptitiously disposing of goods for less than the prices at which he was instructed to sell, and at less than the defendants had agreed to pay when they should take over the stock. He endeavoured dishonestly to reduce the stock for his own and partners' benefit and to the plaintiff's detriment. But, as I have said, the learned trial Judge accepts as truthful the evidence of Mr. French; and, if I were able to find that his evidence was substantially repugnant to the conclusion to which I have come, I should hesitate about it; but I do not find that his evidence is to any material extent opposed to that given on behalf of the plaintiff. As disputes arose as to prices, they were settled between the parties at the time, and before the disputed articles were entered in the inventory, and on several occasions Mr. French was sent for to decide disputes. He says that he thinks his prices were not accepted by the plaintiff; but, when pressed, admits that he may be mistaken about this and could not contradict the evidence to the contrary. The evidence to the contrary is, that his prices were accepted, the matter was settled, and the articles entered in the inventory. It is undisputed that the parties went on with the stock-taking, which lasted a day and a half, and ended at about noon on Friday; and that, when the inventory was complete, there was no objection and no declaration made to the plaintiff or to any one on her behalf, that the prices were not to be considered as settled. Mr. French's evidence upon this point does not contradict that of the plaintiff, and does not help the defendants, and the evidence of Erisman strongly supports this conclusion. I think, therefore, that the production of the invoices was waived. It was not until

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the Monday after the conclusion of the stock-taking that the defendants, through Mr. French, stated that they would not go on with the transaction; but I do not think that the repudiation was even then distinctly based upon the non-production of the invoices. I infer that the total value of the stock was considerably in excess of what the defendants and Mr. French anticipated. Mr. French was agent for two Montreal firms, who were to assist the defendants in financing the purchase; and I think that, when it was found that the purchase-price was larger than anticipated, it was then decided that the undertaking was beyond the means of the defendants, and the non-production of the invoices was seized upon as a ready excuse. The defendants must have felt that they had not acted fairly when they offered to compensate the plaintiff for loss occasioned by the closing of her store at the time of the stock-taking.

There is another matter calling for some comment in this case. In the statement of defence, the plaintiff is charged with having made representations knowingly false. There is not from beginning to end of the case the slightest foundation for such a charge; it was wholly gratuitous, and one which reflects discredit upon those who made it.

I would allow the appeal, and remit the case to the Court below to assess the plaintiff's damages.

*Appeal dismissed;* MACDONALD, C.J.A., *dissenting.*

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## BRITISH COLUMBIA.

APRIL 2ND, 1912.

COURT OF APPEAL.

## CLARK v. CANADIAN PACIFIC R. W. CO.

*Railway—Board of Railway Commissioners—Special Order—General Order—Distance of Water Pipe Stands from Track—Negligence—Injury to Brakesman—Findings of Jury—Statutory Protection.*

**The plaintiff, a brakesman employed by the defendants, while standing on the ladder of a box car attached to a moving train, struck against a water stand pipe, which was not less than 7 ft. 6 in. from the centre of the track, and was injured. In an action for damages for his injuries, the jury found that the defend-**

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ants were negligent in having the stand pipe too near to the track. An order of the Board of Railway Commissioners, dated the 2nd February, 1910, approved the defendants' plan of water stand pipes placed at not less than 7 ft. 6 in. from the centre of the track; but a general order of the Board dated the 9th November, 1910, provided that "water stand pipes shall not be nearer than 2 ft. 6 in. from the widest engine cab." It appeared that the stand pipe which caused the plaintiff's injury was less than that distance from the widest engine cab:—

*Held*, that the second order was not intended to be retroactive, and did not override the first order, which was a special one; and, therefore, the defendants were not negligent in having the stand pipe where it was, as the order of the Board had the effect of a statute.

*Quære*, as to the effect of the orders of the Board not having been promulgated.

Appeal by the plaintiff from the judgment of GREGORY, J., at the trial, dismissing the action, notwithstanding the findings of the jury in favour of the plaintiff, a brakesman who was injured while working for the defendants, and brought this action to recover damages for his injuries.

The appeal was heard by MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

S. S. Taylor, K.C., for the plaintiff.

Sir C. H. Tupper, K.C., for the defendants.

MACDONALD, C.J.A.:—The action was dismissed at the trial, on the ground that the jury could not properly find that the plaintiff had not been guilty of contributory negligence. After a perusal of the evidence, particularly that of the defendants' train master, I am of opinion that there was sufficient upon which the jury could find, as they did, that the plaintiff was not guilty of contributory negligence. Brakesmen were allowed to ride, and made a constant practice of riding, on the ladder on the side of the car, and this seems to have been recognised by the officials as proper and convenient to enable the brakesmen to perform their duties efficiently. The fact that the plaintiff inadvertently failed to remember the danger on this occasion does not, in the circumstances of this case, disentitle the jury to acquit him of contributory negligence; and, if this were the only question involved in the appeal, I should reverse the judgment dismissing the action, and give judgment for the plaintiff.

The difficulty, however, in the plaintiff's way is the existence of an order of the Board of Railway Commissioners, dated the 2nd February, 1910, approving the plan of water

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stand pipes which shews the distance they are to be placed from the centre of the railway track, namely, not less than 7 feet 6 inches. It was, I think, proved satisfactorily that the stand pipe which injured the plaintiff was of this standard type, and was placed not less than 7 feet 6 inches from the centre of the track. The jury found that the defendants' negligence consisted in having this water stand pipe too near to the track. It, therefore, follows that, if it were placed there with authority equivalent to statutory authority, and if the authority has not been withdrawn or displaced by the subsequent order, which I shall presently mention, the plaintiff could have no right of action. The subsequent order relied on by the plaintiff is dated the 9th November, 1910, and it provides that "water stand pipes shall not be nearer than two feet and six inches from the widest engine cab." It appeared that the water stand pipe in question was less than that distance from the widest engine cab.

No evidence was adduced to shew that either of these orders was promulgated pursuant to sec. 31 of the Railway Act, but no objection was taken by counsel to their admission in evidence on that account. That section provides that any order or decision of the Board published by or with the leave of the Board for three weeks in the Canada Gazette, and while the same remains in force, shall have the like effect as if enacted in the Act, and that all Courts shall take judicial notice thereof. What effect failure to prove such publication might have upon this case it is not necessary here to consider, because no objection was taken, either at the trial or on the appeal, based upon sec. 31; and the trial seems to have proceeded on the assumption that both orders were in full force and effect, except as the earlier one might be affected by the later.

The plaintiff's contention is, that the order of November overrides the one of February; while the defendants contend that the order of February being a special, and that of November a general one, the later order has no application to the water stand pipe in question here. I think that the defendants' contention is right. The order of November, if I may say so, is very loosely drawn. On its face it appears to have been made ex parte. It it were intended to be retroactive, or to cancel the previous order, one would expect that the defendants and all other railway companies affected thereby would have been notified of the proposal to make it.

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It was not a weighty matter to decide and direct that all water stand pipes should in future be erected at a specified distance from the tracks; but to direct that all such pipes already erected, along many thousands of miles of railway, should, instanter, where they were within that distance, be removed and made to comply with the order, was a serious matter: and, while uniformity is important in securing safety, yet if so sweeping a change were intended, one would expect that reasonable time would be allowed to enable the railway companies to make the change. The language used in the order is peculiar, and I find some difficulty in construing it. It seems to me to be open to the construction that in future water stand pines shall not be erected nearer than a specified distance from the tracks; but it is also capable of the additional meaning that all existing stand pipes which are less than that distance from the tracks shall be removed. Having regard, however, to the considerations above adverted to, I cannot think it was the intention of the Board to do more than direct that in future the terms of that order should be complied with. In other words, it was not intended to be retroactive. On this point the position of the defendants is perhaps stronger than that of other railway companies, because of the order of February. Had it been the intention of the Board to rescind that order, I think it would have been so expressed in the order of November. In this view of the case, even apart from the maxim generalia specialibus non derogant, the November order cannot be successfully relied upon in aid of the plaintiff.

It follows that the appeal must be dismissed.

IRVING, J.A.:—The action was for damages sustained by the plaintiff, a brakesman on a freight train, on the 24th November, 1910, by striking a stand pipe erected close to the track upon which the train was running.

The Judge permitted the case to go to the jury for precaution's sake: see Bridges v. North London R. W. Co. (1873), L. R. 7 H. L. 213, at p. 235.

The jury found that the defendants were guilty of negligence, viz., permitting the stand pipe to be too close to the track, and that the plaintiff was not guilty of contributory negligence. In answer to question 5, the jury found that the plaintiff could not, by the exercise of reasonable care, have avoided the company's negligence. Question 8 was:

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"Did the plaintiff know of the risk due to the position of the stand pipe, and have a knowledge and appreciation of its danger, and had he at the time of the accident voluntarily accepted the risk as a risk incident to his employment? And the answer was: (a) The plaintiff knew of the risk due to the position of the stand pipe, but, under the circumstances, couldn't appreciate the proximity of the pipe. (b) Yes."

On these answers the learned Judge ordered judgment to be entered for the defendants.

By sub-sec. (g) of sec. 30 of the Railway Act, R. S. C. 1906 ch. 37, the Board of Railway Commissioners is authorised to deal with the structures and works to be used by the railway, so as to protect the employees of the company.

Under that section the defendant company obtained, on the 2nd February, 1910, an order approving of a system of stand pipes to be erected on their road, not less than 7 feet 6 inches from the centre of the track.

The stand pipe in question was erected in compliance with the requirements of that plan.

Prior to the passing of that order, a general order had been made (16th December, 1908), with reference to all railways in Canada, requiring the water stand pipes to be fastened parallel with the main track; and on the 9th November, 1910, that general order was repealed and a new general order, providing that the water stand pipes shall not be nearer than 2 feet 6 inches from the widest engine cab, was promulgated.

This pipe is only 16½ inches from the widest part of engine No. 575, so that, judged by the standard of the order of the 9th November, 1910, it is 13½ inches too close.

The learned Judge, on motion for judgment, came to the conclusion that the plaintiff was the author of his own injury, irrespective of whether the stand pipe was placed in a dangerous position or not, and gave judgment for the defendants, following Dominion Iron and Steel Co. v. Day (1903), 34 S. C. R. 387, and Ryan v. Canada Southern R. W. Co., 10 O. R. 745. Both of these cases are illustrations of the rule laid down by Lord Cairns in Dublin Wicklow and Wexford R. W. Co. v. Slattery (1878), 3 App. Cas. at p. 1166, that in certain cases a defendant is entitled to have a direction to the jury to find a verdict for the defendant. This right was recognised by the Judicial Committee in Toronto R. W. Co. v. King, [1908] A. C. at p. 269. I do not wish to

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express an opinion as to whether or not this was a proper case for the exercise by the Judge of that duty; and it is not necessary for me to do so, because I have come to a conclusion on another point, and that is, that there was no evidence of negligence on the part of the company to go to the jury.

In Grand Trunk R. W. Co. v. Mackay (1903), 34 S. C. R. 81, the Supreme Court of Canada considered the 187th section of the Railway Act (now sec. 30 of ch. 37, R. S. C. 1906), and it was there laid down that the standard of duty, if complied with by a railway company, cannot be regarded by a jury as negligence. Compare Canadian Pacific R. W. Co. v. Fleming (1892), 22 S. C. R. 33.

The defendant company, in my opinion, were governed by the special order of the 2nd February, 1910, and not by the general order of the 9th November, 1910.

The general order of the 9th November, 1910, provides (art. 8) that (a) open drains shall be forthwith covered up; (b) that in future semaphores shall not be nearer than 6 ft. from the nearest rail, and that existing semaphores shall be changed so as to comply with this article within two years; (c) enacts that no structure over 4 feet high shall hereafter be placed within 6 feet from the nearest rail without first obtaining the approval of the Board; (e) water stand pipes shall not be nearer than 2 feet 6 inches from the widest engine cab.

I read (e) with (c), that in placing a stand pipe hereafter it shall be at least 6 feet from the gauge side of the nearest rail; and, if the engine cabs are so wide that this will not give a 2-foot 6-inch space between the stand and the engine, then they must be put back even a greater distance.

It is not to be overlooked that sub-secs. (b) and (c) both deal with the erection of semaphores and structures to be erected; and no provision is made in (e) for the removal of existing stand pipes, although we find in (d) a time limited for the removal of existing switches, etc. The circumstance that the general order of November, 1910, was to come into force at once, and a penalty was given for every offence, goes to shew that the immediate removal of the stand pipes sanctioned by the special order of the 2nd February, 1910, and the erection of others, was not contemplated.

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namely, that the Board, having by the special order prescribed a special minimum measurement for the defendants' stand pipes of 7 feet 6 inches from the centre of the track, to meet the requirements of the rolling stock used by that company, were not in November, 1910, dealing with the defendants at all. This argument seems to me not as strong as the one I have put forward, because the general order is remedial in its nature.

GALLIHER, J.A.:—This is an action for damages for injuries sustained by the plaintiff in the loss of his right hand.

The plaintiff was a brakesman in the defendants' employ, and on the night of the 24th November, 1910, while in the performance of his duties in the yard at Spence's Bridge, a point between North Bend and Kamloops, on the defendants' railway, the whels of the freight car ran over his right arm, cutting off the hand above the wrist. The only evidence as to how the accident occurred is that of the plaintiff, who swears that he was riding on the ladder on the side of a box car which he was ordered to cut off from the train and switch on to a siding in the yard; that, while so riding, the night being dark and the yard badly lighted, he did not see the water stand pipe erected close to the track, and while passing was struck by this stand pipe and knocked under the wheels of the car, suffering the injury complained of. The plaintiff's case is, that the stand pipe was placed so near the track as to be dangerous to brakesmen, and to the plaintiff in carrying out his duty, and that the placing or maintaining of the stand pipe in that position was contrary to an order of the Board of Railway Commissioners, dated the 9th November, 1910. The defendants set up: (1) contributory negligence; (2) volens; (3) that the order of the Board of Railway Commissioners was not retroactive; and (4) that they were not negligent, in that the said Board had by an order of the 2nd February, 1910, permitted the defendants' stand pipes to be in the position and within the distance from the track in which the stand pipe in question was. The question of contributory negligence was left to the jury, and they found in favour of the plaintiff. Such being their finding, and in view of the circumstances disclosed in the evidence, I am unable to say that there was not evidence upon which they could so find; and I also am of opinion that it was a

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case where the evidence was properly submitted to the jury upon that point. If the defendants committed a breach of a statutory obligation in connection with this stand pipe, that would be no answer to a plea of contributory negligence; but in the application of the maxim volenti non fit injuria it might be quite different. In the case of Thomas v. Quartermain (1887), 18 Q. B. D. 685, Bowen and Fry, L.JJ., expressed the opinion (though it is only dictum), that where a statutory duty exists, and a breach is committed, the maxim volenti non fit injuria is not to be presumed to avail (the Master of the Rolls expressing a different opinion); and in the later case of Baddeley v. Earl Granville, 19 Q. B. D. 426, Wills and Grantham, JJ., both expressed the opinion that, under such circumstances, the maxim does not apply. In any event, it appears to me that where a statutory duty is cast upon a master in any particular work, the fact that the servant continues in that work, even if he knows its dangerous character, and appreciates the risk he is running, does not make him volens unless it is brought home to him that he undertook the employment not only with the knowledge of the risk involved, but of the master's statutory duty in respect thereto; and, if such knowledge is not brought home to him, and the master commits a breach of that statutory duty, he is not discharged from his liability to compensate the servant for injuries sustained through such breach of duty.

Here there has been no attempt to shew that the plaintiff had any knowledge that the defendants were under any statutory obligation to have these stand pipes a certain distance from the track, so that in that sense he could not be said to be volens so as to take him out of the protection afforded by statute. Sub-section (e) of the order of the 9th November, 1910, in so far as it affects this case, is as follows: "Water stand pipes shall not be nearer than 2 feet 6 inches from the widest engine cab."

The order of the Board of the 2nd February, upon which the defendants rely, provides that the distance at which the stand pipes shall be placed, measuring from the centre of the track to the centre of the stand pipe, shall not be less than 7 feet 6 inches. The particular stand pipe in question complies with this; but, applying the measurement as specified in the order of the 9th November, the stand pipe does not conform to that standard.

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Two questions are raised in connection with these orders; first, is the order of the 9th November retroactive; and second, if it is so, are the company protected by the order of the 2nd February? It has been laid down that legislation is not retroactive unless it says so in express words, or unless it can be inferred from the language of the Act. We have been referred to the case of Village of Joachim de la Pointe Claire v. Point Claire Turnpike Road Co., 24 S. C. R. 486, but that case does not assist us very much. In that case the words used were: "The company cannot, however, place any toll or other gate within the limits of any town or village incorporated by special charter or under the municipal code unless the corporation consents thereto." The words so used clearly could not be considered to have reference to existing toll gates. The words in the order of the 9th November, however, appear to me to be very different, and wide enough to include not only placing, but maintaining, stand pipes; and, if this view is correct, it would have reference to every stand pipe, whether already existing or to be afterwards erected. It seems to me there is a direct prohibition against any water stand pipe being nearer than the prescribed distance. It may be said that such an order coming into effect at once would be unreasonable, and that the company should, at all events if the order was intended to apply to existing stand pipes, have been given a reasonable time within which to make all existing stand pipes conform to the order. That may be true; but we have to interpret the order as we find it, without regard to whether it may be reasonable or unreasonable; that is, of course, an element that ought to be considered in deciding whether the order was retroactive or not. If this sub-section stood alone, I am inclined to think that the order would be retroactive; but I think sub-sec. (c) of sec. 8 of the same order must be considered and read with sub-sec. (e). This reads as follows: "No structure over four feet high shall hereafter be placed within six feet from the gauge side of the nearest rail without first obtaining the approval of the Board." Now, a stand pipe is a structure, and comes within the general class in sub-sec. (c), and the Board have in effect said in sub-sec. (e)—notwithstanding what is said generally in sub-sec. (c) as to distance of structures from rail—in the case of water stand pipes a distance which may be different is fixed, leaving the word "hereafter" in sub-sec. (c) to govern.

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If I am wrong in this conclusion, it remains to consider whether the company, having obtained the order of the 2nd February, are exempt from the provisions of this order. By virtue of the Railway Act, R. S. C. 1906 ch. 37, sec. 30 (g), the Board may make orders and regulations with respect to the rolling stock, apparatus, cattle guards, appliances, signals. methods, devices, structures, and works to be used upon the railway, so as to provide means for the due protection of property, the employees of the company, and the public; and, by sub-sec. 2 of sec. 30, "Any such orders or regulations may be made to apply to any particular district or to any railway or section or portion thereof, and the Board may exempt any railway or section or portion thereof from the operation of any such order or regulation for such time or during such period as the Board deems expedient."

It seems to me that under these provisions the Board would have power to fix a standard such as was fixed in the order of the 9th November, and exempt from this standard, either in the same order or in a separate one, the present defendants.

In the present case, however, the special order of the 2nd February, confirming plans of the defendants with regard to water stand pipes, is prior in date to the general order; and, as in the general order there is no exception or exemption, we are called upon to decide whether the general order overrides the special order.

A general later order does not abrogate an earlier special one by mere implication: Kutner v. Phillips, [1891] 2 Q. B. 267.

In London and Blackwell R. W. Co. v. Limehouse District Board of Works, 3 K. & J. 123, 26 L. J. Eq. 164, Vice-Chancellor Sir W. Page Wood says: "I confess I entertain a strong opinion on the law applicable to this railway company's special Act, with which the local commissioners are seeking to interfere. Whenever the legislature has, by such an Act, vested powers of a special character in a corporate body or any body of commissioners, for the express purpose of carrying out a particular object which the legislature has in view, no subsequent statute, in merely general terms, giving powers which by their generality apply to the special powers conferred by the former Act, will override the special powers thereby delegated to the particular body of commissioners or corporation."

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While, perhaps, not on all fours, it seems to me that the principle in that case is applicable to the case at bar, if we are to apply the same principle to the orders of the Railway Board as is applied to statutory enactments.

Mr. Taylor, counsel for the appellant, however, urged that the approval of the defendants' plans in the order of the Board of the 2nd February goes no further than permitting stand pipes already erected to remain as constructed, and is, therefore, under their supervisory powers, and not under their legislative powers, as the general order is.

I do not think this can prevail, when we consider the effect of sub-sec. 2, of sec. 30 of the Railway Act, above referred to; and any order confirming a standard for water stand pipes of any particular railway system made under the powers therein granted would be as much within the legislative powers of the Board as would a general order.

It follows, therefore, that, as the stand pipe in question conforms to this order of the 2nd February, by which the defendants are protected, they are not guilty of negligence; and the plaintiff's appeal must be dismissed.

I merely desire to add that there was no evidence adduced to shew that these orders of the Board had been promulgated; but, as neither side took objection, and the whole matter was argued before us as if they had been, I have so dealt with the case.

*Appeal dismissed.*

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## BRITISH COLUMBIA.

APRIL 2ND, 1912..

COURT OF APPEAL.

## GORDON v. HOLLAND.

*Trusts and Trustees—Lands Held in Trust for Partnership —Sale to Partner—Fraud—Acquiescence — Assent of Majority of Partners.*

**Sales of interests in lands held by the plaintiff and defendants as partners, made by the defendant H., one of the partners, in whose name, as trustee for the partnership, the lands stood, were attacked in this action as having been in substance and fact fraudulently made to the defendant W. S. H., who was also a partner:—**

***Held*** **(IRVING, J.A., dissenting), that as to one of the sales the defendants were not guilty of fraud or breach of duty in making**

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**it, even without the assent of the plaintiff, who in fact acquiesced in it; but, as to the other sale, the plaintiff was entitled to succeed, and to have the defendant W. S. H. declared a trustee for him to the extent of his interest.**

***Per* MACDONALD, C.J.A.:—The assent of the majority of the partners was sufficient: Partnership Act, R. S. B. C. ch. 175, sec. 25 (8).**

**Judgment of GREGORY, J., varied.**

Appeal by the defendants from the judgment of GREGORY, J., in favour of the plaintiff, in an action to set aside sales of land held by the defendant Horne as trustee for a partnership.

The appeal was heard by MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Davis, K.C., and W. S. Deacon, for the defendants.

S. S. Taylor, K.C., for the plaintiff.

MACDONALD, C.J.A.:—In May, 1906, the plaintiff and the defendants W. S. Holland, Horne, and one R. W. Holland, purchased three blocks of land, comprising about 43 acres. The transaction was a speculative one, the parties expecting to resell at a profit, at a very early date. In fact, the defendant Horne was induced to join the others and to bear the principal financial burden, namely, 85 per cent of the whole, on the representation that the property could probably be resold before the second instalment of the purchase-money should become due. The conveyance was, by consent of all, made to Horne. Subsequently, there arose a dispute, Horne contending that he had purchased the property outright, on the understanding that he was to divide the profits with the others; Gordon, on the other hand, asserting that Horne was merely a partner in the land, as well as in the profits; this dispute was finally decided by the Judicial Committee of the Privy Council against Horne's contention. Shortly after the purchase, the plaintiff and the defendant W. S. Holland quarrelled over another business, with which Horne had nothing to do; and Horne, finding that these quarrels were hampering the sale of the land, very foolishly, if not dishonestly—though I am inclined to believe that he did not appreciate the responsibilities of a fiduciary relationship—attempted to make a fictitious sale to one Ford. The intention was to vest the legal and equitable ownership and control of the property in Horne himself, in the name of Ford, and thus get rid of the plaintiff, who was found to be

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a difficult man to do business with; but Ford withdrew and the transaction came to an end about the 12th March, 1907. Shortly before this date, Horne had given an option of purchase to the defendant W. S. Holland, at the price of $300 per acre. While in form an option of purchase, it was really an authority to sell. W. S. Holland opened up a correspondence with one Ewing, of St. John, N.B., quoting the price at $325 per acre. Ewing finally made an offer to buy an undivided half interest at that price, and this was received by W. S. Holland about the time the Ford transaction came to an end. Holland submitted this offer to his partners, including the plaintiff. They were all quite satisfied with the price, and that a sale should be made to Ewing, on the terms offered; but the plaintiff, being suspicious of W. S. Holland, demanded that he should make affidavit that he was not receiving a secret profit. Holland declined; but, nevertheless, the sale was made, the plaintiff not actively consenting. While I have grave suspicion that W. S. Holland counted on the completion of the Ford purchase to place him in a position to make a secret profit on a sale to Ewing, yet that intention, if it existed, was frustrated. The sale to Ewing was made without any secret profit or peculiar advantage accruing to any one, and Holland had no arrangement by which he might re-purchase the property from Ewing at a future time, as he, in fact, afterwards did. I am unable, therefore, to see how the attempted wrong-doing of Horne and Holland, assuming that he was a party to it, in the Ford transaction, could in any way taint the Ewing sale with fraud or breach of duty. Having regard to the purpose for which the property was purchased by the partnership, the object being to make a speedy sale for profit; to the representations made to Horne, when he was induced to put his money into it; to the fact that the sale to Ewing was an advantageous one, and in pursuance of that object; that its terms were satisfactory to the plaintiff; that in itself it was an honest transaction; that the plaintiff's conduct was whimsical and unreasonable in demanding from W. S. Holland an humiliating affidavit that he was not a rogue; and that the other partners were willing that the sale should go through—I cannot think that they were guilty of fraud or breach of duty in making it, even without the assent of the plaintiff; in the circumstances, the assent of the majority was sufficient: see Partnership Act, R. S. B. C. ch. 175, sec. 25 (8).



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I am further of opinion that the plaintiff acquiesced in the sale to Ewing, if not at that time, then by his subsequent acts and conduct.

Two years afterwards, W. S. Holland purchased this half interest from Ewing, and the plaintiff now alleges that Holland holds it in trust for him to the extent of his original interest in it. I am unable to agree to this.

But this does not dispose of the whole appeal. Subsequently, the defendant Horne sold the remaining half interest ostensibly to one Spencer, but in reality to Spencer and W. S. Holland. Spencer was innocent in the matter, and no question affecting him arises in this appeal. As the true nature of that transaction was not disclosed to the plaintiff, I am of opinion that W. S. Holland must be held to be a trustee for the plaintiff to the extent of his interest, that is to say, one-sixth of one-half. I am unable to accede to the contention that this sale, having been made while the judgment of the Supreme Court of Canada declaring Horne to be the owner and entiled to sell without reference to the others, was protected by that judgment from attack after the reversal of the judgment.

One of the blocks in question, known as lot 2, was subdivided and sold by Spencer and W. S. Holland to bona fide purchasers without notice. The judgment below directs that the plaintiff shall have his one-sixth (what he was there adjudged entitled to), out of the unsold blocks, with 20 per cent added to make up the adjudged difference in relative value between the unsold blocks and lot 2. I am not sure that this is a proper redress to give; but, as no point was made of this in the appeal, I assume that that mode of adjustment is not objected to.

I would, therefore, vary the judgment below by declaring the plaintiff entitled only to an interest of one-sixth of one-half in the lands out of W. S. Holland's interest in the remaining blocks, with the addition of the 20 per cent. above referred to, and to one-sixth of the profits of the Ewing sale.

I would make no order as to costs. Success and failure have been divided. But, in addition to this, the appellants' conduct all through has been such as to invite an attack on even the Ewing sale.

GALLIHER, J.A., concurred.

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IRVING, J.A.:—The plaintiff brought an action to have the terms of a partnership declared, and succeeded.

The defendants having been guilty of improper conduct, the plaintiff was held entitled to a decree winding up the partnership and directing the defendants to account. It was declared that the plaintiff was entitled to one-sixth thereof. It was a term of the partnership that no sale or dealing with the said lands could be had without the consent of all the partners.

After the accounting had been proceeded with, the plaintiff discovered, or thought he had discovered, that the land (now greatly increased in value) was the property of the defendant Holland, and that the sums he proposed that the plaintiff should accept were sums received by him on the sale to his trustee. He thereupon launched this action.

The sales attacked were:—

(1) The sale to Ewing, dated the 7th March, 1907, of a one-half interest in the three lots, carried into effect by conveyance dated the 21st June, 1909.

On the 8th June, 1909, Ewing had contracted to sell to Holland the said half interest for $17,200. This contract, Holland, on the 21st June, 1909, assigned to the defendant Spencer. These contracts were carried into effect by conveyances, dated respectively the 2nd December, 1909, and the 16th December, 1909.

(2) The other undivided half interest was sold to Spencer for $25,872, by agreement dated the 21st September, 1909, and completed by conveyance on the 21st March, 1910.

The learned trial Judge came to the conclusion that these sales were fraudulent, and that they cannot be the basis upon which the accounts of the partnership are to be taken. I agree with him.

The plaintiff also joined a claim for damages sustained by him by reason of the defendant Holland suppressing certain evidence at the trial of the first action. This branch of the action was dismissed by the learned trial Judge. I agree with the view of the learned trial Judge that neither sale can be upheld. The sale to Ewing of the 7th March, 1907, in my opinion, was not consented to by Gordon. The letter of the 18th March, 1907, shews that it was not a clear sale of an undivided half interest, but a deal, a shifting about of interests to get rid of Gordon. W. S. Holland arranged it with Horne that Horne should part with one-

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half of his interest to Ewing, and retain for himself the other quarter. As to the partnership half interest, he took to himself one quarter, and the other passed to Ewing. It was a juggle to get rid of Gordon, and as such should not be allowed to stand. Never at any time from the 7th March was Holland without an interest in the property greater than the one-sixth interest which, by virtue of the original pact, belonged to Gordon.

I would find as a fact that Gordon never assented to the sale of the property to Ewing.

The plaintiff is entitled to an account of his share of the profits realised by Holland out of the sales of lot 2. The 20 per cent. arrangement should be struck out, if the decree is varied in this respect or if all parties consent to the 20 per cent.

I would dismiss the appeal.

*Appeal allowed as to one branch;* IRVING, J.A., *dissenting.*

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## BRITISH COLUMBIA.

APRIL 2ND, 1912.

COURT OF APPEAL.

### BRITISH COLUMBIA ORCHARD LANDS CO. v. KILMER.

*Vendor and Purchaser—Contract for Sale of Land—Purchase-money Payable by Instalments—Default—Time of Essence—Termination of Contract—Relief against Forfeiture—Circumstances of Case—Specific Performance——Recovery of Down-payment.*

The plaintiffs sold land to the defendant for $75,000, of which $2,000 was paid down, and the balance was to be paid in instalments, the first of which, $5,000 and interest, was to be paid on the 14th June, 1910. Time was expressed to be of the essence of the contract; and it was agreed that, if default were made in payment of any instalment, the contract should become null and void, and all sums theretofore paid should be forfeited to the vendor. The defendant also purchased cattle and other personal effects which were on the property, and expended about $3,000 in improvements. The defendant did not pay the first $5,000 instalment when due, and requested delay, which was granted to him until the 7th July; he did not then pay; and on the 9th July the plaintiffs declared the contract at an end; and on the 12th resold at an advance of $25,000:—

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*Held*, that the defendant's purchase was a speculative one, and that he was not entitled to relief against forfeiture nor to specific performance of the contract, after his default; GALLIHER, J.A., dissenting.

Review of the authorities.

*In re Dagenham (Thames) Dock Co.*, L. R. 8 Ch. 1022, distinguished.

*Per* IRVING, J.A., that the $2,000 paid was not recoverable by the defendant.

Judgment of GREGORY, J., reversed.

Appeal by the plaintiffs from the judgment of GREGORY, J., dismissing an action for a declaration that a certain contract for the sale of land by the plaintiffs to the defendant was null and void; and adjudging, upon the defendant's counterclaim, that he was entitled to specific performance.

The appeal was heard by MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Davis, K.C., for the plaintiffs.

S. S. Taylor, K.C., for the defendant.

MACDONALD, C.J.A.:—The plaintiffs, an incorporated company, sold to the defendant, for the consideration of $75,000, "Sunnyside" ranch. The sum of $2,000 of the purchase-money was paid down, and the balance was to be paid in instalments, the first of which, $5,000 and interest, was to be paid on the 14th June, 1910. Time was declared to be of the essence of the contract; and it was also agreed that, if default were made in payment of any instalment, the contract should become null and void, and all sums theretofore paid should be forfeited to the vendor. The defendant afterwards also purchased cattle and other personal effects on the ranch. It appears to have been the defendant's intention to construct irrigation works on the land, and, when water had been brought on, to subdivide the land for sale in parcels. Some preliminary work was done by him in the way of surveys; and he applied for water under the Water Act; but it does not appear that very much money was expended—I think, less than $3,000. Shortly before the first instalment of $5,000 and interest matured, the defendant requested the plaintiffs to draw upon him for the amount thereof at five days, which was done; but, being unable to find the money in time to meet this bill, he requested further delay, which was granted until the 7th July. The plaintiffs' secretary, in a letter

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notifying the defendant of the last extension, said that his directors "trust that the draft will be met at maturity." The defendant did not meet the bill on the 7th July, but wrote on the 8th making excuses, and stating that the bill would be met on Tuesday (the 12th July). On receipt of this letter on the 9th, a meeting of the plaintiffs' directors was hurriedly called, and the defendant was notified that the "directors considered the deal off, other parties negotiating;" and a resale was made to the "other parties" on the 12th, at an advance of $25,000.

The action was brought for a declaration that, by reason of the non-payment on the 7th July, the agreement became null and void, and should be delivered up to be cancelled.

The defendant contends that the time-clause in the contract is in the nature of a penalty, from which he asks to be relieved; and he relies, amongst other authorities, on In re Dagenham (Thames) Dock Co., L. R. 8 Ch. 1022. While the facts of that case are not very clearly stated either in the above report or in the Law Journal, I think enough appears to shew that that case is distinguishable from this. There, half the purchase-money had been paid; the property was not of a speculative nature; it was not bought for speculative purposes; by the terms of the forfeiture clause in the agreement, the whole works to be erected thereon, as well as the land, might be forfeited even after conveyance. It is, therefore, not surprising that the Court relieved.

In this case, I think it sufficiently appears that the purchase was a speculative one. The defendant appears to have had little or no money of his own; and, while he succeeded in finding the $2,000 to make what, to my mind, is nothing more than a deposit, though to be applied as purchase-money, yet he had no certainty and nothing more than a probability of securing the balance which should be required from time to time to make his payments. Those whom he relied upon to find the money were not disposed to do so; and there is no evidence to shew that, even on the 12th July, the defendant was in a position to make the payment. It was was not until at least a month afterwards that a tender was made. The property was of a speculative nature, and rapidly appreciating in value, as is shewn by the very great increase in selling value evidenced by the resale.

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Now, what are the equities relied upon by the defendant to entitle him to the rellef claimed? I think he cannot claim that the extension of time was one: that extension simply substituted the 7th July for the 14th June. The expression of a hope that the defendant would be able to meet the draft at maturity does not, in my opinion, affect the matter, nor should it, as he contends, have led him to believe that strict compliance with his contract would not be insisted on. Neither the drawing of the bill of exchange nor the increased interest to be exacted for the extension could do more than suspend the plaintiffs' rights under the contract for the period between the 14th June and the 7th July; and, when the draft was not then met, all the rights of the plaintiffs under the contract were restored. The delay in returning the bill of exchange was reasonable, having regard to the fact that it had been sent back to Kamloops after default had been made in the payment of it. In any case, he was not misled or prejudiced by its non-return. It seems to me that none of these circumstances raise any equity in the defendant's favour; but it is said that the taking of possession and the purchase of the personal chattels and the preliminary work done and expense incurred, does raise such an equity. I cannot see how the purchase of chattels can affect the matter one way or the other. Then ought the fact that possession was given, and that a comparatively small sum of money was expended in preliminary work, to induce the Court to say that the contract with respect to time shall not be given effect to? Had the matter proceeded further, and larger payments been made, or works erected on the land, it might be fair and equitable to grant relief; but, in the present circumstances, I do not see that it would be fair and equitable to interfere with what the parties have solemnly agreed to. The taking of possession and the expending of the preliminary moneys was in pursuance of the agreement itself, and in contemplation of the parties when the forfeiture clause was agreed upon. The defendant was not entitled to treat his being let into possession as evidence that forfeiture would not be insisted upon. To so hold would be to nullify this very common term in agreements for the sale of land. Much stress was laid upon the resale at a higher price, and the agreement to pay one of the directors a commission, which it was alleged was contrary to law; but I

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am unable to see how such matters can affect the question at issue in this appeal. If otherwise, then the fact that the price of the land had advanced would automatically modify the agreement; or, if a director committed a breach of duty towards his company, the purchaser would be released from an important clause in his contract. The plaintiffs may have been ungenerous in their treatment of the defendant, but they have done only what he contracted they might do.

I would allow the appeal.

IRVING, J.A.:—I am not able to agree with the learned trial Judge, although I feel, as he does, that the plaintiffs have been very prompt in asserting their rights.

The plaintiffs seek a declaration that the contract entered into by them is null and void, and an order that the application for the registration of the agreement be cancelled.

The defendant counterclaims for specific performance, or, if he shall be held in default, for relief against the alleged forfeiture.

In Roberts v. Berry, 3 De G. M. & G. 284, where the purchaser was refusing to go on with the contract because the abstract was not delivered within 6 or 7 days of the agreed day, relief was granted on the ground of accident; the accident being the absence of the mortgagee of the property from England. Lord Justice Turner, however, said that it was open to the parties to have made the time essential by an express stipulation, or, if the vendor was guilty of delay, by notice.

Lord Cairns, L.C., in Tilley v. Thomas, L. R. 8 Ch. at p. 67, referring to this judgment, said that equity will indeed enforce specific performance, nothwithstanding a failure to keep the dates assigned by the contract for the steps toward completion, if: (a) it can do justice between the parties; and (b) if there is nothing in the express stipulations between the parties, the nature of the property, or the surrounding circumstances, which would make it inequitable to interfere with and modify the legal right.

In this case we have "express stipulations."

As to the nature of the property we are considering, the sale was the sale of an estate of 2,100 acres, in a district where land is rising rapidly in value. These lands, bought in December, 1909, for $75,000, were sold in July, 1910,

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for $100,000, and in November, 1910, are said to be worth $125,000. In January, 1910, there was a ready market apparently for lots at $250 per acre, and there was a clause in the deed that the defendant could subdivide and sell, and, on paying the company $75 per acre, or three-fourths of the price the defendant could get, could obtain a conveyance of the lot. Apparently water was required for irrigating the land; we can judicially notice that it was situate in the dry belt; and a clause in the agreement provided for the immediate acquisition of 1,000 inches of water, and for its distribution over the lands not later than the 14th June, 1911. These considerations point to the speculative nature of the transaction, and the necessity for prompt action.

The defendant paid $2,000 down, placed a man in possession, and caused surveys to be made for the irrigation scheme.

At one time it was supposed that time could not be made of the essence even by express stipulation of the parties; but in Lloyd v. Collett, 4 Bro. C. C. 469, also reported in a foot-note in 7 Ves. 690, Lord Hardwicke, after remarking that "there is nothing of more importance than that the ordinary contracts between man and man which are so necessary in their intercourse with each other should be certain and fixed, and that there should be certainty when a man is bound and when not" (the key-note to the decision of Jessel, M.R., in Barclay v. Messenger, 22 W. R. 522, 43 L. J. Ch. 449), said: "It is one thing to say the time is not so essential that in no case in which the day has by any means been suffered to elapse, the Court would relieve against it and decree performance. . . . But it is a different thing to say, the appointment of a day is to have no effect at all, and that it is not in the power of the parties to contract that if the agreement is not executed at a particular time the parties shall be at liberty to rescind it."

In later cases, and in text-books—e.g., Seaton v. Mapp, 2 Coll. C.C. 556, 564 and Hipwell v. Knight, 1 Y. & C. Ex. 401, 416—the rule has been laid down that where a party applying for specific performance has omitted to perform his part of the contract by the time stipulated in that behalf, without being able to assign sufficient excuse for his omission, and where there is nothing in the acts or conduct of the other party amounting to acquiescence, the Court will not decree specific performance. There seems to pre-

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vail a notion that courts of equity will not grant specific performance where the result will occasion to the defendant a loss, or what he calls hardship, such as loss of a deposit, or even of the chance of profit by the purchaser. That is all wrong. Relief against forfeiture and decrees of specific performance can only be granted on grounds of recognised equity. As pointed out by Anglin, J., in Labelle v. O'Connor, 15 O. L. R. 519, 546, the right of a purchaser to specific performance is one thing; his possible equity to relief from forfeiture of purchase-money paid on account is quite another.

In both cases the onus is on the applicant, and the Court, I think, should be satisfied that he was acting bona fide, and that the default is attributable to fraud, accident, surprise, or mistake, and not to negligence. It is not necessary for the person resisting specific performance to shew any particular injury or inconvenience.

By his contract, the plaintiff was to pay the first instalment, $5,000, on the 14th June, 1910. On the 8th July, he wrote that he had been unable to raise the money, but hoped to do so in a day or two. On the 9th July, the company cancelled the contract, and on the 11th resold the property.

The contract on its face said that time was to be of the essence. The draft of the 11th June, the subsequent extension to the 7th July, were qualified waivers, that is, waivers if the terms were complied with. The extensions were entirely for the convenience of the plaintiff; and, therefore, should not be regarded as operative beyond the day named: see the opinion of Lord St. Leonards (Fry on Specific Performance, ed. of 1911, par. 1126), citing Barclay v. Messenger, with approval.

Between the default and the cancellation some correspondence took place, and the company drew on the purchaser. This draft was not returned to the defendant till the 19th July. Both parties cite In re A Debtor, [1908] 1 K. B. 344. I do not see any evidence that the bill was indorsed to the bank for value; therefore, the mere fact that it was in the hands of the bank for collection at the time of the passage of the resolution, should not, I think, prevent the company proceeding in the way they did.

It was argued that the letter of the 30th June was not sufficiently peremptory to amount to a demand. I can only

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say that the expression "we sincerely trust," followed as it was by other statements shewing how important it was to the company that the bill should be met, was an ample notication to the defendant of what he was expected to do. It certainly could not be regarded as something to lull him to sleep.

The provision in the margin of the bill for the additional 1 per cent., if that provision forms part of the bill, does not seem to me to be material, in view of the fact that the bill was never paid. The whole incident of the bill of exchange, I think, was wiped out, when it was finally dishonoured.

The learned Judge expresses the opinion that, as the tender was made on the 19th August, there was no unreasonable delay. In Barclay v. Messenger, the notice was given by the vendors on the 16th August, fixing the 26th August as the date for payment; and, the money not having been paid on that day, Jessel, M.R., thought the vendors were entitled at once to say, "the contract is at an end:" p. 456 of the Law Journal report.

Under a clause in the agreement, the plaintiffs permitted the defendant to enter into possession, until default in payment, and the defendant agreed "to forthwith after the execution of these presents take all the necessary steps to apply for and obtain a record on Neskanlith Lake, for not less than 1,000 inches of water and carry out and duly perform all necessary surveys and works to bring said water upon the lands above mentioned and cause said water to be available for and be distributed over all said lands in a proper and efficient manner not later than June 14th, 1911, all costs and expenses in any way connected with the obtaining of said record and putting said water on the land as aforesaid to be borne by the party of the second part, who shall also defray all the expenses of managing the said lands as from the date hereof and all costs of surveying and subdividing said lands."

I confess that, had there not been set out in the deed the express understanding that time was to be considered of the essence of the agreement, I would have thought this undertaking of the defendant to bring water on to the land and defray the expenses of managing the same, would have indicated that time was not of the essence; but, unfortunately for him, he has agreed that it shall be otherwise; and,

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in my opinion, where time is of the essence, the Court must give effect to the intention of the parties.

It was pressed upon us that, as the company had in February, 1910, sold to the defendant the live stock and implements of husbandry running upon and used in connection with the land, the defendant was entitled to further and better consideration. The argument was, that the taking possession of the land and the purchase of the live stock and machinery, and the applying for a water record, brought him within the principles of the Dagenham case, L. R. 8 Ch. 1022. The Dagenham case was, so far as the final instalment is concerned, more in the nature of a mortgage than of an agreement to purchase, where payment on the days named is a condition precedent. The Court, in that case, thought compensation would meet the justice of the case.

I have referred to the purchase of the stock and implements; but, in my opinion, the purchase of them in February, 1910, is wholly irrelevant to the agreement of the 14th December, 1909. The fact that this purchase was made tends to shew the hardship of the defendant's misfortune, but it does not alter the right to cancel the contract.

The action of Mr. Robinson in busying himself in the resale is without the defence and wholly irrelevant to the case under consideration. His action does not seem to me to be wrong, having regard to what a man may do in his own interests. see Beatty v. North West Transportation Co., 12 App. Cas. 589.

The reasonableness of the length of the notice given by the letter of the 30th June was questioned; a week, it was said was too short, on the authority of Webb v. Hughes, L. R. 10 Eq. 286. In my opinion, the fact that there had already been one or two extensions must be considered.

It is noticeable that the defendanet did not go into the box. It is hard to believe that the defendant expected that he would be allowed three days' grace on an overdue bill. I think as a general rule relief against forfeiture should not be granted unless the applicant therefor submits himself to cross-examination. Equity has granted relief where the purchaser has gone into possession, and made improvements; but I think these must be proved with precision, and some reasonable explanation of the default would certainly be necessary.

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As the learned trial Judge decreed specific performance, it was unnecessary for him to deal with the $2,000 deposit. It is doubtful if the counterclaim asks for its return. The default clause in the agreement provides that the vendor shall be at liberty to resell, and all payments shall be absolutely forfeited. In an open contract, no money is payable at all until the vendor has shewn, and the purchaser has accepted, the title. Where a purchaser agrees that there shall be a deposit, or "as a deposit and part payment of the purchase-money, it is taken not only in part payment of the purchase-money, but also as an earnest to bind the bargain, and a guarantee for the due performance by the purchaser of his contract, and the puchaser will lose his deposit if his conduct is such as to amount to a repudiation of the contract:" Howe v. Smith, 27 Ch. D. 1, where the nature and incidents of such a deposit are discussed; Sprague v. Booth, [1909] A. C. 576. But where, as here, the word "deposit" is not mentioned, it becomes a question to be determined, upon the circumstances of the case, whether the down-payment is to be regarded as a deposit or an instalment of the purchase-money. Mr. McCaul, in his admirable work on the Remedies of Vendors and Purchasers, thinks that, in the absence of any specific provision, the intent of the parties must be determined to a very great extent upon the proportion that the down-payment bears to the whole purchase-price (p. 60) That seems to be sound; and, having regard to the total amount payable, the sum of $2,000 bears as much resemblance to an earnest as an instalment of the purchase-money can, without being labelled "deposit," and, as there are express words that all payments shall be forfeited, I would hold that it is not recoverable.

If it is not recoverable because of the purchaser's default, why should he be relieved? It will be urged because he is actually seeking performance. That is a fallacious argument. He has brought an action for that purpose, it is true; but he has, at an earlier date, acted in such a way as to justify the other side in declaring the contract void.

I would allow the appeal and make the declaration and order asked for by the plaintiffs, and dismiss the counterclaim.

GALLIHER, J.A.:—In this case I am satisfied that the learned trial Judge came to the right conclusion, and would dismiss the appeal.

*Appeal allowed:* GALLIHER, J.A., *dissenting.*

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## BRITISH COLUMBIA.

APRIL 2ND, 1912.

COURT OF APPEAL.

## DUNN v. ALEXANDER.

*Vendor and Purchaser — Contract for Sale of Land — Misrepresentations by Vendor's Agents—Return of Money Paid—Refusal of Vendor to Complete on Terms Agreed to.*

**The plaintiff sued for the return of money paid by him upon a contract for the purchase of land, alleging misrepresentation and other grounds entitling him to relief:—**

***Held*, reversing the judgment of GRANT, Co.C.J., that the plaintiff was entitled to the return of his money.**

***Per* MACDONALD, C.J.A., and GALLIHER, J.A., that the plaintiff was misled by material misrepresentations made in circulars issued by the defendant's agents.**

***Per* MACDONALD, C.J.A., and IRVING, J.A., that the defendant's insistence on a variation of the terms of the agreement made by correspondence, was fatal to his right to retain the money.**

Appeal by the plaintiff from the judgment of GRANT, Co.C.J., dismissing the action, which was brought to recover the amount of a money-deposit made by the plaintiff upon entering into a contract for the purchase of land.

The appeal was heard by MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

R. M. Macdonald, for the plaintiff.

Alexander, for the defendant.

MACDONALD, C.J.A.:—In the view I take of this case, it is unnecessary to consider whether or not the defendant had a good merchantable title to the lot in question. To my mind, it is quite evident that the plaintiff was misled into Co.C.J., dismissing the action, which was brought to recover back, by the representations made to him in circulars by the defendant's agents, the Canadian Northern Securities Company Limited. It is not necessary to rely on the letterheads of this company of letters written to the plaintiff after the purchase, though these, together with the circulars, shew the versatility of this company in the arts of deception.

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The two circulars (exhibits 6 and 7) are unique, even in real estate transactions. Apart altogether from the similarity in name of this company and the Canadian Northern Railway Company, the contents of the circulars are well calculated to lead any ordinary person to the conclusion to which, as he swears, the plaintiff was led, that is to say, that the lots offered for sale were in the town-site which was owned by Mackenzie and Mann, the president and vice-president respectively of the Canadian Northern Railway Company. Exhibit 7 consists largely of extracts from Vancouver daily newspapers, and interviews with or statements made by Mr. Mann, now Sir Donald Mann, and the land commissioners of the the Canadian Northern Railway Company, and referring either directly or by implication to the Mackenzie and Mann town-site, or to the Canadian Northern Railway proposals and works. For instance, an extract from one of these articles, dated the 6th August, 1910, states that "new plans of the Canadian Northern Railway in reference to Port Mann, its town-site, opposite New Westminster, are being formulated and will soon be carried out." And again, in March, 1911, quoting from an interview with one McMillan, who speaks of statements made to him by Colonel Davidson and Mr. McRae, joint land commissioners of the railway company, and saying: "The public sale of lots, however, will likely not take place until late in the summer, or early next fall, owing to the magnitude of the task of clearing and grading the town-site. From what I learn in London, I think the future sale will easily eclipse the phenomenal record made at the auction of Prince Rupert lots." In another article Mr. McRae is quoted as saying, "All the flat land in proximity to the water front, embracing hundreds of acres, has been reserved for railway terminals." And again, "All the water frontage within the limits (Port Mann) has been reserved for docks, &c." Under the heading, in large letters, "Port Mann's Future," an interview with Mr. Mann appears, in which he is quoted as saying, "Our idea in buying land on the south side of the Fraser opposite New Westminster is based on several considerations," &c.

The defendant's said agents offered lots for sale in "Port Mann subdivision of sec. 9, range 1, west." They say: "Inside property is always as good as money. This subdivision is the first offer for sale *within the town-site.*" The

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italics are mine. They also say, "Now note this—the remainder of the town-site lots will be put on the market and sold by auction about July next."

But why pursue the matter further. Deceit is stamped all over these circulars, and they are so skilfully prepared as to make it impossible to put one's finger on any actual misstatement, but the whole appears to have been designed and certainly is well calculated to mislead the public into the belief that it was lots in the town-site of Mackenzie and Mann, known as Port Mann, that were being offered for sale; and throughout these circulars there is no statement, no hint even, that what the defendant was offering was something different.

Now, unless, with full knowledge of the true situation, the plaintiff has waived his rights, and elected to confirm the sale, which, on the evidence, I find he has not, then he is entitled to the relief which he claims.

There is another matter which would entitle the plaintiff to the same relief. The agreement made by correspondence contains no restrictions upon the plaintiff's right to have title shewn and made in the usual way by the vendor. The formal agreement which the defendant sent to the plaintiff for signature, but which was never delivered, contains such restrictions, and the plaintiff was threatened with the law if he did not sign and return it to the defendant. While the plaintiff's letter of the 10th May does not fully raise this objection to the formal agreement, still, I think, he has not waived it, and the defendant's insistence on this variation of the agreement is, in itself, fatal to his right to retain the purchase-money.

I would allow the appeal, and direct that judgment be entered for the plaintiff for the return of the money paid.

IRVING, J.A.:—This is an action to recover the deposit made on entering into a contract for the purchase of land. It is a common law action, and has nothing to do with any of the equitable rules or doctrines in relation to specific performance.

On the 16th April, 1911, the plaintiff, having seen an advertisement in some newspaper that the Canadian Northern Securities Company were selling lots at Port Mann, wrote to that company asking for a map. Having received a map, and one of the Canadian Northern Securities Com-

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pany's forms, he applied on the 24th April for a lot, and agreed to pay therefor (without saying how much in all) "$237.50 cash, and the balance in half-yearly instalments, extending over two years;" and, fearful lest he should not secure the good thing that was going, he telegraphed the money to the company. Price not being stated, I doubt if there was any binding offer. However, assuming that it was an offer, the company received the money, and the agent wrote (27th April) that the company had reserved the lot for him. I doubt if this was an acceptance of the plaintiff's offer. The contract thus made was an open contract for the sale by the company of the lot in fee simple, free from incumbrances. The nature and incidents of such a deposit are discussed in Howe v. Smith, 27 Ch. D. 89.

The contract—if contract there was—contemplated that the company would deliver to the purchaser a proper abstract of title to the property, and afford the purchaser an opportunity to examine the deeds, and then, if the title was accepted, and on payment of the purchase-money, to convey the property free from incumbrances, by a proper deed, with the usual covenants, and to put the purchaser in possession; that would, in view of the stipulation, be in two years' time. Mr. Macdonald says that his client had a right to repudiate the contract with the company as soon as he discovered that the company were not the vendors. Granted that is so, if the objection was made at once; but the plaintiff could not take that stand. I believe that the common law is this: if the vendor fails to shew a good title on the face of his abstract at the time of its delivery, he thereby commits such a breach of the contract as discharges the purchaser from the duty of performing his part of the agreement. The vendor's obligation is a condition precedent to the purchaser's. In this case there was no abstract delivered nor demanded. The company, having obtained the plaintiff's name and description, sent to him a new agreement—practically a new proposal (Larkin v. Gardiner, 27 O. R. 125), by which one Alexander, the defendant, agreed to sell to him the same lot for $950, payable $237.50 in cash, and the balance in four instalments with interest at 7 per cent., the plaintiff to be entitled to take possession at once, and stipulating that the vendor should not be bound to furnish any abstract or to afford to the purchaser the usual facilities for examining into the title. In short, the agreement Alexander to Dunn was wholly



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different to the contract (if contract there was) made between the company and Dunn. Immediately after the receipt by the defendant of this proposed agreement, it was open to him to repudiate the proposed contract at once, on many grounds, e.g., that he had not contracted with Alexander, but the company; that he had made a bargain under which he was entitled to have an abstract delivered to him, at the vendor's expense, and produce also, at his own expense, all proper evidence of all deeds, &c., mentioned therein.

But, instead of doing this, he wrote the letter of 10th May, 1911, complaining of the provision that he was to pay the costs of the conveyance Alexander to himself—something that the purchaser usually does pay. On the 15th May, the company wrote that he had misread the agreement, and asked him to execute the document and return it. On the 6th June, the plaintiff wrote to the company that he would call on them next week with the agreement.

All this correspondence shews that he recognised that the company were merely the agents of Alexander.

"Next week," he called on a solicitor in Vancouver, who searched the title, and found that Alexander was not the owner in fee, but held an agreement for sale from one Barby. This fact that Alexander was not the owner in fee was seized upon and put forward as a ground for not proceeding further with the contract, although the time for making a good title had not arrived; and, later on, the plaintiff advanced a further reason, viz., that the company had, by using as part of their name the words "Canadian Northern," and exhibiting on their stationery a railway engine, misled the plaintiff into believing that they were connected with—to follow the language of the statement of claim—had direct association and fiscal relationship with the Canadian Northern Railway Company, and that it was only on account of this association with this great railway company that the plaintiff was induced to buy the lot in question. This last ground can be disposed of in a few words. In my opinion, it is not a bona fide defence, and was trumped up in July, long after the plaintiff knew that Alexander was his vendor. I agree with the learned trial Judge that, as there was no evidence that the plaintiff had been misled, there was nothing in the name of the company, nor in the embellishment on the company's stationery, to lead any one to believe that the land being offered for sale was the railway company's land.

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I also agree with the learned County Court Judge that Alexander's title has been shewn to be such that he can, at the proper time, give the plaintiff a good title in fee simple; but the time for so doing has not yet arrived.

The difficulty that I find in supporting the judgment appealed from is, that the defendant admits that he has refused to complete with the plaintiff, save and except on the terms of the written agreement of the 24th April. As I have already pointed out, that document does not contain the terms which by implication are read into the receipt; and, as it was to secure the performance of the sale under the open contract or receipt that the deposit was made, the plaintiff must succeed.

GALLIHER, J.A.:—In my view, it is only necessary to deal with one feature of this case. A perusal of the literature sent to the plaintiff before he purchased would, I venture to say, lead ninety-nine men out of a hundred, reading it casually, to infer that they were being asked to purchase lands in the railway company's town-site.

In fact, on a careful analysis of the circulars, one is impelled to the belief that they were carefully and designedly prepared to create that impression without in explicit terms saying so. Such being my views, and the plaintiff swearing that he was so misled, there can be only one result.

The appeal should be allowed with costs and judgment entered for the plaintiff with costs.

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## BRITISH COLUMBIA.

APRIL 2ND, 1912.

COURT OF APPEAL.

## BROWN v. HOPE.

*Damages—Delay in Delivery of Goods—Pleading—General Damages — Special Damages — Evidence — Opinion of Witness—Basis of Assessment—Reference for Assesment —Discretion of Trial Judge.*

**In an action for the price of a dredge sold by the plaintiffs to the defendants, the defendants counterclaimed for damages for delay in delivery, claiming specifically $5,000 loss of profit on a dredging contract which they expected to obtain when they ordered the dredge, and $2,500 loss on costs of scows, this sum being thrown**

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**away in consequence of the plaintiffs' delay. The trial Judge refused to allow damages on either of these heads, but allowed general damages based on the net earning power of the dredge per day for the days of delay, and directed a reference to assess damages on that basis, no evidence being given at the trial to enable the Judge to assess the damages on that basis:—**

***Held*, that general damages, though not claimed in the pleading, were included in the special damages, and sufficient evidence had been adduced to shew that the delay in delivery had occasioned loss to the defendants; the basis on which damages were allowed by the trial Judge was a proper one; and, having determined the principle, he was within his right and discretion in delegating the assessment, according to that principle, to an officer of the Court.**

***Held*, also, that, in a civil action, any fact which tends to affect the amount of damages is relevant and admissible; but the opinion of a witness as to what would have happened but for the delay was not admissible.**

**Judgment of MURPHY, J., affirmed.**

Appeal by the defendants and cross-appeal by the plaintiffs from the judgment of MURPHY, J., in an action for the price of a dredge and a counterclaim for damages for delay in delivering the dredge.

The appeal was heard by MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

McCrossan, for the defendants.

Bodwell, K.C., for the plaintiffs.

IRVING, J.A.:—By a contract dated the 21st February, 1910, the plaintiffs agreed to ship to the defendants on or before the 28th April, 1910, a dredge. The price was $8,050, of which $1,000 was paid in cash. The dredge was not shipped until the 6th June. The plaintiffs then brought an action for the price, and recovered judgment for $7.614. The defendants counterclaimed for damages, and specifically claimed: (a) $5,000 loss of profit on a dredging contract which they expected to obtain when they ordered the dredge; and (b) $2,500 loss on cost of scows, this sum being the amount thrown away or needlessly incurred in consequence of the plaintiffs' delay in making delivery of the dredge.

The learned trial Judge thought the case was governed, so far as the delay in delivery of the dredge was concerned, by Elbinger Actien Gesellschaft v. Armstrong (1874), L. R. 9 Q. B. 473, and that the defendants were entitled to damages; but he refused to allow any damages in respect of the contract for the bonus paid for hurried construction of the scows, or for loss of profit of an expectation of obtaining a particular contract.

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The damages which he thought proper to allow were ordered to be assessed by the Registrar, not the damages specifically claimed, but general damages which he based on the net earning power of the dredge per day for 39 working days.

From this judgment the defendants appeal. It was said that the only damages asked for were the two items above set out, and no claim had been made for general damages.

It was also objected that, as there was no evidence given at the trial which would enable the Judge to assess the damages on the basis settled by him as the proper basis of assessment, he should have dismissed the counterclaim, instead of directing an assessment.

In my opinion, neither of those objections should be allowed to prevail.

By sec. 14 of the Arbitration Act, power is given to the Court or Judge to refer to the Registrar for inquiry and report; and by sec. 15, the Court or a Judge may refer "for trial." Whether the Judge will deal with the case himself or refer it under these sections is a matter for his discretion. In Wallis v. Sayers (1890), 6 Times L. R. 356, the Lords Justices complained of the practice of dealing with a common law action as if it were a Chancery suit. The report is interesting to read. It would seem that the practice of referring matters to the Registrar may be overdone. Although it is usual for the trial Judge himself to dispose of damages, I cannot say that there was not jurisdiction to refer this matter. It is perfectly clear that he could allow an adjournment for the purpose of allowing the evidence to be got together.

As to the argument that, because of the non-pleading of general damages, and of the omission on the part of the plaintiffs to give evidence at the trial, as to what damages had been sustained by the delay in delivering the dredge, the Judge should have dismissed the counterclaim, instead of in his judgment ordering a reference, I am of opinion that the discretion of the Judge should not be interfered with. I do not think any one could say that he was wrong if he had, before reserving his judgment, ordered the amendment to be made, and expressed his intention of referring the assessment to the Registrar, in the event of his coming to the conclusion that the defendants were entitled to any damages. It was his duty to get to the heart of the dispue. In my opinion,

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the general damages, though not pleaded, were included in the special damages, and sufficient evidence had been adduced to shew that the delay in delivery had occasioned loss to the defendants. The division of damages into special and general has been said by Lord Macnaghten to be more appropriate to cases of tort than to cases of contract. Very often, as in this case, the same evidence that was submitted to prove the specified damage for loss of the expected contract, was sufficient to shew that there was a substantial loss occasioned by the delay, and that the defendants were, at the very outset, aware that such would be the result of delay; and it would be contrary to justice to dismiss the action because the defendants were not prepared to establish what was the exact pecuniary loss. In London Chatham and Dover R. W. Co. v. South Eastern R. W. Co., [1892] 1 Ch. at p. 152, where the action was rather one for specific performance than an action for damages for breach of contract, and where the pleadings did not ask for damages, Kay, L.J., said: "I need not consider these difficulties. If the case were one in which justice required that such damages should be given, the Court would not be prevented, under our present system, by any technical difficulty from doing justice."

The measure of damages proposed by the learned trial Judge is practically the same as that adopted by Lord Cairns in Trent v. Humber Co., In re Cambrian Steam Packet Co. (1868), L. R. 4 Ch. 117.

As to proving damages for delay, see Lord Halsbury's speech in Clydebank Engineering and Shipbuilding Co. v. Don Jose' Ramos Yzquierdo y Castaneda, [1905] A. C. 6. at p. 11. The law of damages contemplates that the person contemplating should be placed in the same position as he would have been in if the contract had been performed; and the plaintiffs, having been informed of or knowing the circumstances from which they could infer the use the dredge would be put to, ought to compensate the defendants for the delay in delivery.

As to the $2,500 for loss on scows, the claim is this, that the dredge was expected to be ready for shipment on the 28th April. In order to have a scow ready by the date on which the dredge would arrive, had it been shipped on that date, the defendants had to pay a bonus of $2,000. As the dredge did not arrive when expected, they, the defendants, feel that the bonus was thrown away, and that they are entitled to

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recover it from the plaintiffs. Such a loss does not seem to me to have been in the contemplation of the parties.

As to the $5,000, there is a difference, as pointed out by Mr. Bodwell, between determining whether the plaintiff is entitled to any damages, i.e., substantial or nominal, or none at all, and the assessment of the damages. The Judge deals with the first. The jury have to deal with the latter. In exercising this duty, they have a very wide field, and to assist them the Judge gives directions; but, in giving those directions, the Judge does not lay down hard and fast lines, and then send the jury away to work out the result according to his directions. He puts before them the case in a more general way, and then they make an award such as they think proper to give under all the circumstances.

But where the Judge has to determine the damages without a jury, he lays down for himself with exactness the rule that he thinks ought to be followed. Can the plaintiffs complain that he, by awarding a sum for general damages, takes into consideration the established fact that there was plenty of employment to be had? I don't think they can.

Can the defendants complain that the Judge refuses to regard the contract with the commissioners as a settled thing? I don't think they can.

The Judge, in my opinion, arrived at a fair measure of compensation.

In my opinion, the trial Judge was right in stopping the defendants' witness Mathers from giving evidence as to what the commissioners would do. The general rule is, that, in a civil action, any fact which tends to affect the amount of damages is relevant and admissible; but this question seeks to obtain the opinion of the witness, and that is not permissible.

I would dismiss the appeal and cross-appeal, and refuse the application for a new trial. I would refuse this on the ground only that it is unnecessary; the course adopted by the trial Judge is sufficient to meet the justice of the case. The amount of damages ought to have been settled by the parties themselves.

MACDONALD, C.J.A., and GALLIHER, J.A., agreed that the appeal and cross-appeal should be dismissed.

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## BRITISH COLUMBIA.

APRIL 2ND, 1912.

COURT OF APPEAL.

## McKENZIE v. GODDARD.

*Estoppel—Representation — Recital in Deed—Acknowledgment of Payment Made by Vendor — Payment not in Fact made — Innocence of Assignee of Purchaser — Failure to Allege or Prove.*

**The defendant agreed, by a written instrument under seal, to sell land to F., and therein acknowledged the payment of $50 on account of the price. As a fact, only $26 was paid; a post-dated cheque for $24 was given, and, when presented by the defendant, was dishonoured. When the defendant discovered this, he notified F. that the agreement was cancelled; but, prior to that notification, F. had assigned the agreement to the plaintiff. Later, the plaintiff tendered the balance due, and requested a conveyance, but the defendant refused; and the plaintiff brought this action for specific performance, paying the amount tendered into Court:—**

***Held*, that, if the plaintiff were an innocent purchaser without notice, the defendant would be estopped from setting up that he did not receive the $50; but, as it was neither pleaded nor proved that the plaintiff innocently acted upon the representation, and the plaintiff did not even pledge his oath to it, the action must fail.**

**Judgment of GRANT, Co.C.J., affirmed.**

Appeal by the plaintiff from the judgment of GRANT, Co.C.J., dismissing an action by the assignee of a purchaser for specific performance of a contract for the sale and purchase of land.

The appeal was heard by MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Findlay, for the plaintiff.

Ritchie, K.C., for the defendant.

GALLIHER, J.A.:—The learned County Court Judge was under the impression (the case not then being reported) that Goddard v. Slingerland, 16 B. C. R. 329, decided by this Court, concluded the case at bar, and so decided. That case, however, has no application, as the rights here are inter partes.

The plaintiff claims under an agreement, entered into between the defendants and one Franks, for the sale to

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Franks of certain lands in the agreement set out, and which agreement was assigned to him. In the agreement, the receipt of $50 is acknowledged, and the balance, $200, is to be paid in monthly instalments. As a matter of fact, only $26 of this $50 was paid in cash; a cheque for $24, payable some months afterwards, which turned out to be worthless, was given for the balance.

When the defendants discovered that the cheque was worthless, he notified Franks that the agreement was cancelled; but, prior to such notification, Franks had assigned to the plaintiff.

The plaintiff, some time afterwards, tendered the balance due and requested a conveyance, but the defendant refused, saying that the agreement was cancelled.

This action is for specific performance, the plaintiff paying the amount tendered into Court.

Apart from the Land Registry Act, the defendant relies on the fact, as he contends, that the plaintiff stands in the shoes of Franks, and that his rights are subject to any equities existing between the defendant and Franks.

If the plaintiff is an innocent purchaser without notice, he does not stand in Franks's shoes, and the defendant is estopped from setting up that he did not receive the payment acknowledged in the agreement: Halsbury's Laws of England, vol. 13, p. 371, par. 523; Rimmer v. Webster (1902), 71 L. J. Ch. 561.

In Winter v. Lord Anson, 3 Russ. 488, cited by Mr. Ritchie, Lord Anson purchased with notice of the plaintiff's claim, and retained sufficient out of the purchase-moneys to indemnify him.

The case at bar was submitted to the trial Judge upon the pleadings and certain admissions by counsel. It does not appear from these whether the plaintiff had or had not notice that Franks had not made the whole of the first payment of $50, nor was the point taken before us; but it appears to me that, if the plaintiff is relying on an equitable right, outside of the rights he acquired under the assignment, viz., that of a purchaser without notice, he must allege and prove the same.

Having failed to do so, I am of opinion that the appeal should be dismissed.

MACDONALD, C.J.A., concurred.

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IRVING, J.A.:—It is said that the recital in the deed that the $50 has been paid in full estops the defendant from setting up this non-payment: Halsbury's Laws of England, vol. 13, par. 365.

That we may assume to be so if the plaintiff innocently acts upon the faith of the representation.

In this case we have no evidence that the plaintiff innocently acted upon the representation.

I think the plaintiff must at least pledge his oath to that fact. In Rice v. Rice, 2 Drew. 73, evidence appears to have been given.

I would dismiss the appeal.

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## BRITISH COLUMBIA.

APRIL 2ND, 1912.

### COURT OF APPEAL.

## FARQUHARSON v. CANADIAN PACIFIC R. W. CO.

*Fire—Destruction of Timber—Origin of Fire—Railway — Sparks from Engine—Spread of Fire — Dominion Railway Act, sec. 298—Modern Appliances — Condition of Right of Way — Damages — Appeal — Reversal of Trial Judge's Finding of Fact—Inferences from Evidence.*

*Held*, upon the evidence, reversing the judgment of MORRISON, J., 19 W. L. R. 76, that the fire which destroyed the plaintiffs' timber originated from sparks thrown by an engine of the defendants, and that the defendants were liable in damages for the plaintiffs' loss; but the plaintiffs' recovery must be subject to sec. 298 of the Dominion Railway Act, it appearing that the defendants used modern and efficient appliances, and it not having been shewn that the fire originated in the right of way, or that the dangerous condition of the right of way facilitated its spread.

Damages were assessed by the Court at $500.

*Per* MACDONALD, C.J.A.:—The trial Judge's conclusion being based on inferences from facts, and not on the credibility or deportment of witnesses, the Court was free to draw inferences which appeared to be just, and so to reverse the finding of the Judge.

Appeal by the plaintiffs from the judgment of MORRISON, J., 19 W. L. R. 76, dismissing an action to recover damages for destruction of the plaintiffs' property by fire alleged to have originated from sparks thrown by an engine of the defendants.

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The appeal was heard by MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Davis, K.C., for the plaintiffs.

Bodwell, K.C., for the defendants.

MACDONALD, C.J.A.:—In this case, apart from the question of damages, there is little or no conflict of evidence. On the whole, the witnesses appear to have been exceptionally fair. The learned Judge treated the question of the origin of the fire as one of inference to be drawn from the facts in evidence, and same to the conclusion that no safe inference could be drawn that the fire was started by sparks from the defendants' train. That being so, I am not embarrassed by questions turning on the credibility or deportment of witnesses, and am free to draw the inferences which appear to me to be just. The first question is: did the fire which was discovered near the defendants' railway at about two o'clock in the afternoon of the 15th June, originate from a spark or sparks from the defendants' locomotive engine which passed that point half an hour previously? The inference I draw from the evidence is, that the fire so originated.

The second is, was it this fire smouldering in the locality until the 13th July, then fanned into flame by a high wind, which on that day leaped the Elk river, and, catching on the opposite bank, spread to the plaintiffs' land and destroyed their timber? I think the evidence is conclusive that it was. While it has been satisfactorily proven that the defendants' right of way was covered with inflammatory material, at or opposite to the place where the fire originated, yet it has not been shewn that the fire originated in the right of way, or that the dangerous condition of the right of way facilitated its spread. Hence I think the plaintiffs' recovery must be subject to sec. 298 of the Railway Act, it appearing that the defendants used modern and efficient appliances.

The only other question is that of the quantum of damages. I have read the evidence on this head with some care, because I felt that we ought not to put the parties to the expense of an assessment by referring the case back for that purpose. There is great discrepancy between the estimates given by witnesses on each side; but, having regard to the evidence of the defendants' experts, and the price at which similar timber tracts could be purchased in the neighbourhood, the plaintiffs' estimate must be materially cut

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down. I think full justice would be done by fixing the sum at $500.

The plaintiffs are entitled to costs here and below.

IRVING, J.A.:—With every deference to the learned trial Judge, I am of opinion that he misapprehended the evidence given before him. There can be no doubt that the fire leaped across the river, the several witnesses have said so, and the Judge has so found. The question is really limited to this: did the defendants start the fire which crossed the river on the 13th July? The driver of the second train saw the fire about 2.15; the driver of the first train did not see it at 1.55. Johnson saw it about 2 p.m., and Anderson, the defendants' servant, also saw it about 2.15. We may take it that he went to put it out as soon as he was aware of it. Teefer, the defendants' roadmaster, said that in the evening of the 15th June some four acres had been burnt. Murphy, the fire warden, who saw it on the 16th June, said there were some four or five acres burnt; that he examined the ground, and found it burnt from the track, and across the track down towards the river; that the right of way at this point was dirty; that the soil was peaty; and that the fire started on the 15th was never wholly extinguished.

Johnson, who remained working in the immediate vicinity, says the fire continued till the 13th July, when it leaped across the river.

Johnson, Anderson, and Murphy all say that the fire they saw on the 13th July was the same fire they had seen on the 15th June. Anderson says that on the 13th July it had spread a little closer to the river. Murphy, Johnson, Jackson, and Campbell testify to its crossing the river on the 13th July.

The defendants did not call Anderson at the trial. His admissions (at pp. 212 and 213) probably account for this. If he had really stamped out the fire which occurred on the 15th June, he would, no doubt, have been called.

Again, if the officer who examined the engine immediately after the fire had found the bonnet in good order, his testimony would have been most valuable as tending to shew that the engine could not have emitted sparks. The defendants, with these means of refutation in their power, having omitted to call these witnesses, the strongest presumption arises that the fire arose from a defect in the first engine. I,

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therefore, infer that they were guilty of negligence. The measure of proof sufficient to warrant a verdict of a jury, or a finding by a Judge, varies much according to the nature of the case. I can only say that I am satisfied, to the entire exclusion of every reasonable doubt, that the fire in question was caused by the defendants' negligence. I cannot say that the fire arose on the right of way.

For these reasons, I think my brother Morrison should have found for the plaintiffs.

I agree with the Chief Justice as to damages.

GALLIHER, J.A., concurred.

*Appeal allowed.*

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## BRITISH COLUMBIA.

APRIL 2ND, 1912.

COURT OF APPEAL.

## MILLS v. MARRIOTT.

*Vendor and Purchaser—Contract for Sale of Land—Default in Payment of Deferred Instalment of Purchase-money—Notice of Forfeiture—Defective Service—Specific Performance—Contract not Executed by Purchaser—Adoption by Action—Down-payment—Deposit or Part of Purchase-money.*

**Specific performance of a contract for the sale of land was decreed at the suit of the purchaser, although time was of the essence, and default had (by inadvertence) been made in the payment of the second instalment of the purchase-money, notice of forfeiture not having been given in accordance with the agreement, as *held* by the majority of the Court.**

***Per* GALLIHER, J.A.:—An agreement is not necessarily unilateral because one party does not sign it; it may become a binding agreement by his acts.**

***Per* IRVING, J.A.:—The notice given was not sufficient to put an end to the contract; but, as the plaintiff was aware of the default and took no steps to remedy it, he should be refused specific performance. Although the plaintiff did not execute the agreement, having brought this action upon it, he should be held to all the conditions imposed by it. The down-payment, not being a deposit, but part of the purchase-money, should be returned to the plaintiff, and the contract declared rescinded.**

Appeal by the plaintiff from the judgment of the trial Judge dismissing the action, which was brought to enforce

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specific performance of a contract for the sale of land by the defendant Marriott to the plaintiff.

The appeal was heard by MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Craig, for the plaintiff.

J. A. Russell, for the defendants.

GALLIHER, J.A.:—I would allow this appeal. I think, with respect, that the learned trial Judge erred in classing this as an unilateral agreement. It does not follow that, because one party to an agreement does not sign, it is an unilateral agreement. It may become a binding agreement by the acts of the party.

In the case at bar, the plaintiff paid the first instalment of the purchase-money; and, knowing that he would be absent, left instructions with his partner to pay the second when it became due, together with the necessary funds for that purpose. This is clearly shewn by Dodson's evidence. His partner, through inadvertence, omitted to do so. The whole question then turns upon the insufficiency of the notices sent in accordance with the agreement. The words are: "The said notice shall be well and sufficiently given if delivered to the purchaser or mailed under registered cover addressed as follows: Clement Mills, 531 Richards Street, Vancouver, B.C."

The second payment was due on the 22nd February, 1910, and was not made, and on that day or a couple of days afterwards, the defendant Marriott called up the plaintiff's office and obtained his address in England. It is to be noted that he made no mention to the plaintiff's partner, Mr. Dodson, that a payment was due, or any inquiry as to whether Mills had left any instructions regarding the same; but, instead, he proceeded to have a notice of forfeiture made out, addressed in a lady's handwriting, in an unofficial looking envelope, which was marked "private," and had it mailed to the address as specified in the agreement, and a duplicate sent to the English address. The notice mailed to the Vancouver address was received there; but, on account of its being marked private, and the manner in which it was addressed, and the envelope used, was not opened by the plaintiff's partner, but returned to the post office.

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These circumstances have created a suspicion in my mind which has caused me to construe that notice with strictness; and the conclusion I have come to is, that under the circumstances it was not a good notice.

It is not proven that the notice mailed to England was delivered to the plaintiff there; and, in fact, the plaintiff swears that he never received it until after his return to Canada.

I may say, however, that I am not very much impressed with the plaintiff's evidence in this regard; but the defendants have failed to satisfy the onus cast upon them, if they rely on the notice sent to England as delivery.

I think the defendant Boyd must be taken to have had notice of the plaintiff's claim, as an application to register the Mills agreement, together with the agreement itself, was on file in the land registry office at the time Boyd purchased.

There should be judgment for the plaintiff as in the first paragraph of the plaintiff's prayer, and with costs.

MACDONALD, C.J.A., concurred

IRVING, J.A.:—The plaintiff's application for specific performance cannot be regarded as bona fide, or he would have gone into the witness-box. I think a plaintiff applying for specific performance, or for relief against forfeiture, ought, as a rule, to submit himself to cross-examination.

In this case the plaintiff, through his own carelessness, got into default. The true agreement between the vendor and purchaser was, that time should be of the essence of the contract. Strong, C.J., a great authority on equitable doctrine and practice, said in Wallace v. Hesslein, 29 S. C. R. 171, 174: "In order to entitle a party to a contract to the aid of the Court in carrying it into specific execution, he must shew himself to have been prompt in the performance of such of the obligations of the contract as it fell to him to perform." I break off to ask, does the plaintiff satisfy this requirement, by getting from another person, partner or friend, an undertaking to meet the anticipated payment? What follows shews how necessary it was for the plaintiff to go into the box: "And always" (that means hereafter) "ready to carry out the contract within a reasonable time, even though time might not have been of the essence of the agreement."

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In my opinion, the notice to the purchaser was not invalidated by writing the word "private" on the envelope. I see no good reason to believe that the use of that word, or of the other so-called devices, constituted a trick to prevent the purchaser receiving the notice. As a matter of fact, it was actually in the hands of the plaintiff's clerk. The fact that the defendant Marriott sent a duplicate notice to the plaintiff's address in England rebuts the idea that there was any intention on his part to take an unfair advantage of the plaintiff. No person in the world would be able to anticipate that the plaintiff's partner would act in such an unreasonable way as to send a letter addressed to him to the dead letter office.

The notice, in my opinion, was not sufficient to put an end to the contract. It was not delivered to the postal authorities until the 25th February. Therefore, the notice was not a thirty-day notice. The defendant's notice must be in strict compliance with the power contained in the agreement: see March Bros. & Wells v. Banton, 45 S. C. R. 338, ante 322.

But, as the plaintiff was aware of the default on the 14th March, 1910, the day the duplicate notice reached his mother's house in England, and took no steps, he should be refused specific performance.

The plaintiff, it appears, did not execute the deed of agreement; nevertheless, I think the plaintiff, having brought this action on the written agreement, ought to be held to all the conditions imposed by the vendor.

It is not possible for him to execute it in part.

As to the $250 paid down, I would order that to be returned and the contract to be rescinded. The word "deposit" is not used; the word "balance" shews that it is part of the purchase-money. The amount being an aliquot portion of the purchase-money tends to support the idea that it is a payment on account, and the absence of a forfeiture clause—all these circumstances shew that we should now regard it as a payment simply on account of and as part of the purchase-money.

*Appeal allowed;* IRVING, J.A., *dissenting.*

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## BRITISH COLUMBIA.

APRIL 2ND, 1912.

COURT OF APPEAL.

# AUSTIN v. REAL ESTATE LISTING EXCHANGE.

*Contract—Warranty of Authority—Principal and Agent—Agent's Commission on Sale of Land—Breach of Warranty—Measure of Damages.*

The plaintiffs, who were land brokers, sued the defendant C. for a commission for obtaining a purchaser for her land, and the defendants the Exchange upon a warranty of a contract by the defendant C. to pay a commission for finding a purchaser. The Exchange "listed" the property of C. for sale, and sent out to their subscribers, who were all land brokers, notices informing them that it was for sale; and, according to the bargain between the Exchange and their subscribers (the plaintiffs being subscribers), if any of the latter made a sale he was to have a commission. At the trial it was found that the defendant C. had withdrawn the land from the hands of the Exchange before the plaintiffs found a purchaser, and the action was dismissed as against her; but, as the Exchange still kept the property on their list, they were regarded as warranting a contract, and held liable to the plaintiffs in damages, assessed at the amount of the commission which would have been payable upon a sale:—

*Held*, that the defendants the Exchange were properly found liable; and that the measure of damages applied was correct.

Appeal by the defendants the Real Estate Listing Exchange from the judgment of the trial Judge in favour of the plaintiffs as against the defendants for breach of warranty of authority to agree on behalf of the defendant Mary Casher to pay the plaintiff a commission if he obtained a purchaser for the lands of the defendant Mary Casher, which he did. The plaintiff in the same action sued Mary Casher for the commission, but as against her his action was dismissed.

The appeal was heard by MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Ritchie, K.C., for the appellants.

R. M. Macdonald, for the plaintiffs.

GALLIHER, J.A.:—The defendants the Real Estate Listing Exchange carry on business in the city of Vancouver, and obtain the listing of properties from various persons for sale



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upon commission. They do not make the sales themselves, but turn over to their subscribers (real estate brokers) the properties thus obtained for sale.

Their lists are sent to each subscriber from day to day, and any alterations in terms or otherwise, or withdrawals, or sales, are noted on these lists against the respective properties. For this information and opportunity the subscriber pays $20 per month, and the first subscriber obtaining a purchaser for a piece of property, and making a deposit with the Exchange, is deemed to be entitled to the commission, and is given a receipt for the deposit and an order on the vendor for the commission.

The plaintiffs in this case were subscribers to the Exchange, and received a list containing, among others, a piece of property belonging to the defendant Mary Casher, with price, terms, etc. This was in June; and on the 8th July the same property appeared in the regular list sent out, with the note "reduced from $6,000 to $5,700." No sale, however, was made by the plaintiffs, nor does it appear that they made any effort to sell, until November of the same year, when, owing to the time that had elapsed since the property had first appeared as listed, inquiry was made by them of the Exchange, to put it in their own words, "was this property still good?" to which they say they received the answer, "Yes, it has not been withdrawn." The Exchange say their answer was, "It is not marked sold on the list." However, the plaintiffs proceeded to advertise the property, and make a sale to one Stimson, took a deposit of $50, which they handed over to the Exchange, and obtained from them a receipt and order on the defendant Mary Casher, for the amount of the commission. It transpired, when the plaintiffs went to Mrs. Casher to complete the deal with Stimson for their commission, that she had sold the property herself to another purchaser, in the previous July.

This action was then brought against Mary Casher for the amount of the commission—$275—and alternatively against the Exchange for breach of warranty of authority to list the property.

At the trial Mary Casher denied positively having signed the listing agreement (exhibit 7), although she says she did sign a listing form which was good only for fifteen days, and was subject to owner's confirmation; that from the day the canvasser from the Exchange called upon her until the

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plaintiffs' lawyer wrote to her after the sale, she heard nothing of the Exchange people, and had no conversation or correspondence with them, and never gave them any authority to sell except for fifteen days and at $6,000.

F. A. Tourell, who obtained the listing and turned in exhibit 7 to the Exchange, swears positively that Mrs. Casher signed the same at her house in his presence, and his name is affixed as shewing that the property was listed by him.

There was a direct conflict between these two witnesses, both of whom gave evidence in Court; and the trial Judge has found in favour of Mrs. Casher, and dismissed the action as against her.

Whatever might be my personal view, I have not had the advantage of seeing the witnesses, and feel I would not be justified in interfering with that finding.

I am satisfied that the Exchange received this as a genuine listing, and acted bona fide throughout in so holding it out to their subscribers; but that does not relieve them from responsibility if it afterwards turns out, as found by the learned trial Judge, that in fact there was no such listing as asserted, if a third party has acted upon that guaranty. The case of Yonge v. Toynbee (1910), 70 L. J. K. B. 208, fully covers that point in the present case.

A further feature was urged as against the plaintiffs' right to recover from the Exchange, viz., that, as a long time had elapsed between the listing in the first place as set out in the lists furnished the subscribers before any action was taken by the plaintiffs to sell the property, the plaintiffs should have satisfied themselves before incurring any expense, or making any efforts to sell, that the property was still in the market, and under the control of the Exchange, and that the plaintiffs should not have relied on the conversation over the telephone.

Whether we accept the version of that conversation as given by the plaintiffs, or as given by the Exchange, it seems to me to make no difference.

The Exchange held out and guaranteed to their subscribers that the information contained in their lists sent out was correct, and invited them to act thereon, and at the time the inquiry was made over the telephone in November by the plaintiffs, it was the duty of the Exchange to have satisfied themselves that the property was still under their control, before permitting the plaintiffs to incur expense in

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connection therewith. That was one of the considerations for the payment of the monthly fee.

I think the learned trial Judge was right; and that the measure of damages is the commission which the plaintiffs would have earned.

The appeal should be dismissed with costs.

MACDONALD, C.J.A., concurred.

IRVING, J.A.:—We must have regard to the implied warranty of authority which the Exchange are supposed by law to have given the plaintiffs when they entered into the contract, i.e., that they had the authority which they professed to have.

Where this implied warranty exists, there is an exception to the rule that no damages can be obtained for innocent misrepresentation. The leading case of Collen v. Wright (1857), 8 E. & B. 647, was a decision by the Exchequer Chamber, affirming a decision of the Queen's Bench, and was a case of an agent innocently assuming that he had authority to contract. More recent cases have extended the liability to every transaction, e.g., Firbank v. Humphreys (1886), 18 Q. B. D. 62; and Starkey v. Bank of England, [1903] A. C. 114.

The measure of damages is discussed in many cases. I shall refer to two only, Spedding v. Nevill, L. R. 4 C. P. 212; and Meek v. Wendt & Co., 21 Q. B. D. 126. Prima facie the plaintiffs are entitled to what they would have gained by the contract which the Exchange had warranted should be made.

I would dismiss the appeal.

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## BRITISH COLUMBIA.

APRIL 2ND, 1912.

COURT OF APPEAL.

## TRITES WOOD CO. v. WATERS.

*Appeal—Question of Fact—Finding of Trial Judge—Satisfaction of Demand—Quit-claim Deed—Evidence.*

*Held*, upon the evidence, that the defendant had not made out his defence, viz., that he had given and the plaintiffs had accepted a quit-claim deed of land in satisfaction of the amount for which they afterwards sued; and no ground was shewn for interfering with the finding of WILSON, Co.C.J., the trial Judge.

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Appeal by the defendant from the judgment of WILSON, Co.C.J., in favour of the plaintiffs in an action to recover the amount due by the defendant upon a purchase of land.

The appeal was heard by MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Davis, K.C., for the defendant.

Craig, for the plaintiffs.

IRVING, J.A.:—The defendant undertook to prove that he had in June, 1908, executed in favour of the plaintiffs a quit-claim deed, which they had accepted in satisfaction of the amount he was then owing them, and that they were also to pay him $400.

The member of the plaintiff company with whom this arrangement was said to have been made, denies all knowledge of any such transaction. The solicitor who, it is said, prepared the document, denies having done so. Apart from these contradictions, I would not accept the defendant's story. His evidence seems to me to be inconsistent with the other established facts of the case, and it is not corroborated in any way by the documentary evidence.

GALLIHER, J.A.:—There are phases in the transaction in question in this case which seems to point strongly to the truth of the defendant's contention; but, on the other hand, the evidence on behalf of the plaintiffs preponderates; and, unless I am prepared to say that that evidence is absolutely inconsistent with a reasonable view of the circumstances, I would not be justified in reversing the finding of the learned trial Judge.

I have weighed the evidence carefully from every viewpoint; and, had the defendant succeeded in establishing his giving of a quit-claim of all his interest in the property in question to the plaintiffs, I would have had little difficulty in disposing of this case. This fact was found against him by the trial Judge, and I am unable to say that he came to a wrong conclusion.

MACDONALD, C.J.A., concurred.

*Appeal dismissed with costs.*

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## BRITISH COLUMBIA.

APRIL 2ND, 1912.

COURT OF APPEAL.

## MACPHERSON v. CITY OF VANCOUVER.

*Highway—Defective Grating in Sidewalk — Nonrepair or Misfeasance—Liability of Municipal Corporation—Negligence — Notice — Third Party—Remedy over—Nonliability.*

**Upon the evidence, the defendants, a city corporation, were *held* liable to the plaintiff in damages for injuries sustained by the plaintiff by falling through a flimsy wooden grating placed in the cement sidewalk opposite a shop owned by the third party; and the third party was *held* not liable over to the defendants; the fault being that of the defendants, and they having had notice of the condition of the sidewalk.**

Appeal by the defendants from the judgment of the trial Judge in favour of the plaintiff in an action for damages for personal injuries sustained by reason of nonrepair or defective construction of a sidewalk; and appeal by Mrs. Stirling, the third party, from the judgment of the trial Judge in favour of the defendants for relief over against the third party.

The appeals were heard by MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

W. A. Macdonald, K.C., for the defendants.

Davis, K.C., for the plaintiff.

J. A. Russell, for the third party.

IRVING, J.A.:—An accident occurred in June, 1909, the plaintiff sustaining injury by falling through a wooden grating, which the city officials had, in 1907, placed in the cement sidewalk opposite a shop or store owned by Mrs. Stirling in Granville street, one of the chief streets of Vancouver, near the centre of the town.

The judgment, which proceeded on the ground that the defendants, the city corporation, were guilty of misfeasance, went against the defendants in favour of the plaintiff, but the defendants were given a remedy over against Mrs. Stirling.

From that judgment the defendants appealed, and Mrs. Stirling also appealed.

The appeal of the defendants was limited to the 7th ground, viz., that there was no evidence adduced at the trial

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of any notice or knowledge on the part of the defendant corporation of the nonrepair of the sidewalk in question."

There was, in my opinion, abundant evidence to support this, viz., that the defendants' officials had taken the grating in question and placed it in the cement sidewalk, and that its construction as part of the sidewalk was as flimsy as it well could be; and that the nails used to support it, or the cleats upon which it rested, were rusted.

The argument of the defendants was based on the want of notice: Rice v. Town of Whitby (1898), 25 A. R. 191, and McGregor v. Township of Harwich (1899), 29 S. C. R. 443, being cited. In those cases the work complained of was done by somebody for whose acts the corporation were not responsible. The transplanting of this well-worn grating from its original board sidewalk to the new granolithic bed was the handiwork of the city officials. Here there was negligent work in the construction of the thing, and it is not necessary to fall back on Cooksley v. City of New Westminster (1909), 14 B. C. R. 330, 10 W. L. R. 106, 11 W. L. R. 476.

The appeal of Mrs. Stirling is not so easily disposed of; and I confess that I have felt grave doubts as to the correctness of my conclusion with regard to it.

The sections governing the right of remedy over are secs. 149-154 of the Vancouver Incorporation Act, ch. 54 of the British Columbia statutes of 1900. The provisions of a very similar statute were discussed in Sombra v. Township of Moore (1891), 19 A. R. 144, at p. 150.

Mrs. Stirling bought the property in question in November, 1902, from one Davidson. The opening in the wooden sidewalk was made by Davidson, without permission.

The cement walk was built by contractors who had a contract with the defendants to do all work required during the year under the supervision of the city officials. It was built in November, 1907. The third party relies on the exception in the statute, and contends that this excavation was "made by a servant or agent of the corporation." The defendants contend that the third party's liability turns on the fact that Mrs. Stirling left and maintained the excavation. She undoubtedly did "leave" and "maintain" the excavation. It was there for her convenience; but was she bound to examine it? And, if the defendants did not strengthen it according to her views, was she at liberty to do the work? In the Manitoba case to which we have been referred, there was an active leaving and maintenance. Here her leaving and maintaining was passive. It would be more

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correct to say that she permitted the work to remain rather than that she maintained the excavation.

On the whole I am disposed to allow the appeal in her case.

MACDONALD, C.J.A.:—I would dismiss the appeal of the defendants. The grating in question was placed in the new sidewalk by the defendants themselves, without any interference on the part of Mrs. Stirling. Whether she would or would not have been liable had the accident occurred while the grating was in the old sidewalk, which had been torn up by the corporation, is a matter which I need not consider. The defendants are not entitled to recourse against Mrs. Stirling for damages resulting from their own act.

I would, therefore, dismiss the appeal of the defendants and allow the appeal of the third party.

GALLIHER, J.A.:—The only ground urged before us by the defendants as against the judgment in favour of the plaintiff was want of notice of nonrepair. In the light of the evidence, this cannot prevail, and the appeal must be dismissed with costs.

The third party Stirling is appealing against the judgment over against her in favour of the defendants. The defendants, in 1907, when they took up the old wooden sidewalk and replaced it by cement, left the area or space as it was, and, instead of covering the space with a new and substantial grating, took up the old wooden grating which had been in use for five years, and utilised it. This work was done under the supervision of the defendants, and Mrs. Stirling had nothing whatever to do with it, nor has she any control over it. I think the placing of this old grating in the new sidewalk by the defendants is faulty construction and misfeasance.

I cannot see under what principle the defendants can claim over against Mrs. Stirling.

The evidence discloses a state of facts which takes it out of the application of the statute of incorporation (sec. 149 of the Vancouver Incorporation Act, 1900).

The cases cited by Mr. Macdonald, for the defendants, all of which I have carefully read, are, on the facts, clearly distinguishable.

The appeal of the third party should be allowed with costs.

*Defendants' appeal dismissed and third party's appeal allowed.*

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THE

# Western Law Reporter

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## ALBERTA.

APRIL 13TH, 1912.

SUPREME COURT EN BANC.

## REX v. ROYAL BANK OF CANADA.

*Constitutional Law—Provincial Statutes Incorporating Railway Company and Authorising Issue and Guaranty of Bonds—Subsequent Statute Requiring Proceeds of Sale of Bonds to be Paid to Provincial Treasurer—Intra Vires—Dealing with Rights beyond Province—Locality of Proceeds—Deposit in Bank—"Debt"—Banking Legislation—Confiscation—"Assigns"—Lien—Interest.*

**The judgment of STUART, J., 19 W. L. R. 377, holding the Alberta Act of 1910, requiring the proceeds of the sale of bonds by a railway company to be paid to the Provincial Treasurer, to be *intra vires* of the provincial legislature, was affirmed by the unanimous judgment of the Supreme Court *en banc*.**

**There was a division of opinion upon the question of interest; but, in the result, the judgment was affirmed upon all grounds.**

Appeal by the defendants, the Royal Bank of Canada, the Alberta and Great Waterways Railway Company, and the Canada West Construction Company, from the judgment of STUART, J., 19 W. L. R. 377.

The appeal was heard by HARVEY, C.J., SCOTT, BECK, and SIMMONS, JJ.

R. B. Bennett, K.C., and H. H. Hyndman, for the defendants the Royal Bank of Canada.

Frank Ford, K.C., for the other defendants.

C. A. Masten, K.C., and L. F. Clarry, for the Crown.



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HARVEY, C.J.:—By ch. 46 of the statutes of 1909, assented to on the 25th February, 1909, the legislature of this province incorporated three persons therein named, all resident out of the province, by the name of "The Alberta and Great Waterways Railway Company," and empowered the company to construct a railway wholly within the province and to issue bonds to the extent of $40,000 a mile, and to any extent desired for terminals at Edmonton, and conferred upon the Government the option of purchasing the company's rights and properties at any time. By ch. 16, assented to on the same day, the provincial Government was authorised to guarantee the payment of bonds of the company to the extent of $20,000 a mile for a mileage not exceeding 350 miles, and to the extent of $400,000 for terminals. The Guarantee Act provided that the moneys realised by sale of the bonds should be paid by the purchaser directly into a bank or banks approved by the Lieutenant-Governor, "to the credit of a special account in the name of the Treasurer of the province of such other credit as the Lieutenant-Governor in Council may direct," that the balance at credit should be "credited with interest at such time and at such rate as may be agreed upon between the company and the bank holding same." There were two alternatives for payment out, the second of which, which was the one accepted by the company, is specified as follows: "The moneys so paid into the said bank shall be paid out to the company from time to time upon the completion (except as to ballast) of every section of ten miles of railway line to the satisfaction of the Lieutenant-Governor in Council according to the specifications," &c., and as certified by the Government engineer, there being special provisions for the part relating to the terminals.

On the 29th October, 1909, an agreement was executed between the railway company and the Government, as provided for by the Acts, settling the details for the carrying out of the Acts. It is provided in the agreement that the "proceeds of the bonds shall be paid into a bank or banks approved by the Lieutenant-Governor in Council, to the credit of a special account in the name of the Treasurer of the province, and shall be paid out to the company from time to time upon the completion, except as to ballast, of every section of ten miles of railway to the satisfaction of the Lieutenant-Governor in Council," &c.

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A sale of the bonds was effected in England, the payment of the proceeds being arranged through the banking house of Morgan in New York. Arrangements were made with different banks having branches in this province for the deposit of the moneys, $6,000,000 of the $7,000,000 for road proper being deposited with the defendant bank and placed to the credit of the Treasurer of the province in the Edmonton branch, in this province, the account standing in their books as follows: "The Provincial Treasurer, Province of Alberta—Alberta and Great Waterways Railway Co. Special A/c." The ledger account also bears the following particulars, "Address, Edmonton, Alta.," and "allow 3½% interest." The payment of the proceeds of the bond sale was made in four monthly instalments, the first being credited on the 4th November, 1909, the deferred instalments bearing interest, the total amount received by the bank being $6,042,083,26. The ledger account shews the interest to have been computed and added up from time to time as the different instalments were paid in, and thereafter each three months, the amount appearing on the 30th September, 1910, as $218,335.55, to which on the 31st December, $52,-144.18 was added, making the total at that time $270,479.73.

The evidence shews that there was some public excitement over this railway transaction, that there was a Royal commission to investigate, and that there was a change of Government, which took place in May, 1910; and, during the session of the legislature following, two further statutes were passed relating to this matter, assented to on the 16th December, 1910. The first of these Acts is ch. 9, and is intituled "An Act respecting the Bonds guaranteed for the Alberta and Great Waterways Railway Company being an Act to specify certain defaults of the Railway and the consequent Rights of the Province." This Act recites the two Acts above mentioned, the execution of bonds to the amount above specified secured by mortgage, the sale of the bonds, and the default of the company in the payment of interest thereon and the payment by the Province of such interest, the default in the construction of the line, and the fact that the proceeds of the bonds are lying in the banks named, of which the defendant bank is named as holding $6,000,000 and interest.

The enacting part is as follows:—

"1. The Province of Alberta hereby ratifies and confirms the guarantee by it of the said bonds, and the Treasurer of

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Alberta is hereby empowered and instructed to execute a guarantee on behalf of the province of said bonds.

"2. The whole of the proceeds of the sale of the said bonds and all interest thereon, including such part of the proceeds of said sale as is now standing in certain banks in the name of the Treasurer of the province or otherwise, as follows, viz.:—

"Six million dollars and accrued interest in the Royal Bank of Canada;

"One million dollars and accrued interest in the Union Bank of Canada;

"Four hundred thousand dollars and accrued interest in the Dominion Bank;

is hereby declared to form part of the general revenue fund of the province of Alberta, free and clear of any claim thereon or thereto by the Alberta and Great Waterways Railway Company, their successors or assigns, and, together with all accrued interest thereon, shall, to the extent to which they are so held, be forthwith paid over by the banks hereinbefore recited, and by any other person holding any part thereof, to the Treasurer of the province, without any set-off, counterclaim, or other deduction whatsoever.

"3. Notwithstanding the form of the said bonds and the guarantee thereof, the Province of Alberta shall, as between itself and the Alberta and Great Waterways Railway Company, be primarily liable upon the said bonds to the several holders thereof, and the Province shall indemnify and save harmless the railway company and its assets and undertaking from any and every claim made under the said bonds or any of them."

The other Act is ch. 11, and is intituled, "An Act respecting alleged Claims in Connection with the Alberta and Great Waterways Railway Company," and provides that any one claiming to have suffered loss or damage in consequence of the passing of the preceding Act may file a claim with the Clerk of the Executive Council with the evidence in support thereof, that the Lieutenant-Governor in Council shall investigate and consider or cause to be investigated and considered such claims, and report to the Legislative Assembly, but that nothing in the Act shall be deemed to establish a liability enforceable in a Court of law.

Immediately after the passing of these Acts, a demand was made on behalf of the Provincial Treasurer on the defendant bank for the amount deposited with it with interest

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and for the amount without interest, which demands were refused.

No money had been paid out in the meantime, and the evidence indicates that no portion of the railway has been completed so as to entitle the company to any payment. The company had, however, entered into an agreement with a construction company for the construction of the railway, agreeing to assign to it, in consideration therefor, all of its assets, including the proceeds of the bond sale. The terms of the agreement as to these proceeds, which may be of some importance, are as follows:—

"The payments of the proceeds of the said bonds shall be made when and as the same are payable to the railway company under the terms of the said in part recited agreement and statutes of the Province of Alberta," and

"For the purpose of more fully effectuating and carrying out the intention of the parties hereto, the railway company assigns, transfers and sets over and agrees to assign, transfer and set over, as and when the same shall be earned and payable, to the construction company, the proceeds of the said bond issue, and the cash subsidy, if any, to be paid to the railway company by the Government of the Dominion of Canada."

Subsequently, on the 8th March, 1910, a formal assignment was executed, the operative words being "have assigned, transferred and set over, and by these presents do assign, transfer and set over, when and as earned under the terms of the statutes in that behalf and the agreement for the construction of the railroad made between His Majesty the King and this company, the proceeds of the $7,400,000 issue of bonds," &c. On the same day the construction company executed an assignment to the defendant bank, which recited its indebtedness and the contemplation of further indebtedness for advances made in the ordinary course of business, and assigned to the bank, "as collateral security for the said advances, all the proceeds payable to us, as and when earned, of the bonds," &c. (This is the correct reading of the original, though the word "as" does not appear in the appeal-book.)

The chief defences to the plaintiff's claim relate to the validity of the Act ch. 9 of 1910, though it is also contended that, even if valid on a proper construction, it does not support the plaintiff's claim. It is urged that the Act is ultra vires the legislature:—

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(1) Because it does not come within any of the classes of subjects assigned by sec. 92 of the British North America Act to the Provinces.

(2) Because it deals with essential banking legislation, which is assigned exclusively to the Dominion under sec. 91, and is in conflict with the Dominion Bank Act, R. S. C. 1906 ch. 29: (a) in altering a time deposit to a demand deposit; (b) in destroying a banker's lien; (c) in destroying the effect of the assignment, which was a valid security under the Bank Act.

(3) Because it confiscates private property for the raising of a revenue.

It is necessary to consider these objections in detail.

Lefroy's Legislative Power in Canada, p. 416, advances the following proposition as laid down by the Privy Council in Russell v. The Queen, 7 App. Cas. 838: "The true nature and character of the legislation in this particular instance under discussion—its grounds and design and the primary mater dealt with—its object and scope, must always be determined in order to ascertain the class of subject to which it really belongs, and any merely incidental effect it may have over other matters does not alter the character of the law."

On this principle, counsel for the plaintiff maintains that, keeping in view the other Acts to which I have referred, it is clear that the Act questioned does really fall within both class 10, "Local Works and Undertakings," and class 16, "Generally Matters of a merely Local or Private Nature in the Province," and that it also comes within class 13, "Property and Civil Rights in the Province."

I am inclined to the view that this contention is correct; but, whether or not it should be held to be included in classes 10 and 16, it appears to me that the very recent decision of the Privy Council in Rex v. Lovitt, [1912] A. C. 212, definitely concludes the question in favour of its being covered by class 13. In that case it was held that money deposited in a branch bank in New Brunswick, whose head office was in England, and whose head office for Canada was in Quebec, was property in the province of New Brunswick. The question there was, whether taxation imposed on this property came within class 2, "Direct Taxation within the Province." It is apparent that, for the purpose of that case, this means "Direct taxation on property within the

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Province;" and the conclusion of that case, therefore, furnishes an exact interpretation of the words of class 13 as applying to the present case.

It may be noted that in the present case, not merely was the deposit made in the defendant bank's branch at Edmonton; but, that it should be so made was a condition of the delivery up of the bond.

The fact that persons resident out of the province have certain rights which may be affected by the legislation cannot render the legislation invalid if otherwise unobjectionable, as was pointed out in Jones v. Canada Central R. W. Co., 46 U. C. R. 261.

Having reached the conclusion that the legislation is on a subject on which the province is given power to legislate, it is necessary to consider whether it is objectionable on the second ground urged, as being essential banking legislation or in conflict with the Bank Act. It is apparent, to any one examining and considering the provisions of secs. 91 and 92, that legislation under the different classes of one section must very frequently trench on one or more of the classes of the other section, and there are numerous decisions of the Privy Council and the Canadian Courts upholding such legislation.

The principle applicable under such circumstances was laid down in Grand Trunk R. W. Co. v. Attorney-General for Canada, [1907] A. C. 65, in which Lord Dunedin, who delivered the judgment, states: "A comparison of two cases decided in the year 1894, namely, Attorney-General for Ontario v. Attorney-General for Canada, [1894] A. C. 189, and Tennant v. Union Bank of Canada, [1894] A. C. 31, seems to establish these two propositions: first, that there can be a domain in which Provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires, if the field is clear; and, secondly, that, if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail."

In Huson v. Township of South Norwich (1895), 24 S. C. R. 145, at p. 155, Taschereau, J., referring to the former of the two cases cited by Lord Dunedin, says: "It results from that case, if I do not misunderstand it, that there are, under the British North America Act, subjects which may be dealt with by both legislative powers, and that the Provincial field is not to be deemed limited by the possible range of un-

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exercised power by the Dominion Parliament, so that a power conferred upon the latter, but not acted upon, may, in certain cases, be exercised by the provincial legislatures if it fall within any of the classes of subjects enumerated in sec. 92."

In Canadian Pacific R. W. Co. v. Notre Dame de Bousecours, [1899] A. C. 367, in which the validity of a provincial Act was impugned as an interference with the Dominion's power to regulate Dominion Railways, it is stated at p. 372: "The British North America Act, whilst it gives the legislative control of the appellants' railway, qua railway, to the Parliament of the Dominion, does not declare that the railway shall cease to be part of the provinces in which it is situated, or that it shall in other respects be exempted from the jurisdiction of the provincial legislatures."

In Bank of Toronto v. Lambe (1887), 12 App. Cas. 575, in which the validity of a Quebec Act imposing taxes on corporations, including banks, was upheld, it is stated at pp. 585-6 as follows: "It has been earnestly contended that the taxation of banks would unduly cut down the powers of the Parliament in relation to matters falling within class 2, viz., the regulation of trade and commerce; and within class 15, viz., banking and the incorporation of banks. Their Lordships think that this contention gives far too wide an extent to the classes in question. They cannot see how the power of making banks contribute to the public objects of the provinces where they carry on business, can interfere at all with the power of making laws on the subject of banking, or with the power of incorporating banks." And again: "Then it is suggested that the legislature may lay on taxes so heavy as to crush a bank out of existence and so to nullify the power of Parliament to erect banks. But their Lordships cannot conceive that, when the Imperial Parliament conferred wide powers of local self-government on great countries such as Quebec, it intended to limit them, on the speculation that they would be used in an injurious manner. . . . But, whatever power falls within the legitimate meaning of classes 2 and 9 is, in their Lordship's judgment, what the Imperial Parliament intended to give; and to place a limit on it because the power may be used unwisely, as all powers may, would be an error, and would lead to insuperable difficulties in the construction of the Federation Act."

In the light of the foregoing principles, it is necessary to consider the objection that this is banking legislation. It

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is said that the Act makes a time deposit payable forthwith, thereby changing it into a demand deposit, thus dealing with an essentially banking transaction.

The terms of the statute on which this money was to be deposited have already been referred to. In addition, the evidence shews that the assistant general manager of the bank wrote the president of the construction company the following letter on the 23rd October, 1909: "Provided the Government of the Province of Alberta will, out of the proceeds of the sale of the Alberta and Great Waterways Railway Company's 50-year first mortgage 5 per cent. bonds, place on deposit with the Royal Bank of Canada the sum of $6,000,000, to be withdrawn only as and when the same shall become payable to the said railway company under the progress estimates to be issued from time to time in connection with the construction of the said railway company's line of railway, and then only to the extent of 6-7ths of such estimates, and provided the Canada West Construction Company Limited will furnish the bank with a satisfactory continuing guarantee for the sum of $1,000,000 against loss, the Royal Bank of Canada will undertake to grant the Canada West Construction Company Limited, credit to the extent of the following amounts within the specified periods, viz.: $750,000 to April 1, 1910, to be increased to $1,250,000 between April 1, 1910, and January 1, 1911, to be reduced to $750,000 by January 1, 1911, and to be paid in full by January 1, 1912. This bank will also, upon the security of bills of lading or warehouse receipts, covering new rails required for the said railway, make advances to the extent of 80 per cent. of the mill cost of such rails, plus freight to Edmonton. This bank will charge interest at the rate of 5 per cent. upon all advances made, and allow interest at the rate of 3½ per cent. on the amount of the deposit standing at credit of the Alberta Government trust above indicated."

And that the Premier of the Province wrote the president of the railway company on the 28th October, 1909, the following letter: "The Government of Alberta is agreeable to the change proposed by you, that the three millions of dollars that was to have been deposited to the credit of the Provincial Treasurer in the Traders Bank of Canada be paid instead into the Royal Bank of Canada, thus making six millions of dollars of the purchase-price of the bond issue of the Alberta and Great Waterways Railway Company

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to be deposited to the credit of the Provincial Treasurer of Alberta in the Royal Bank. You can assure the Royal Bank that the Government will abide strictly by the terms of the Act of the Provincial Legislature which states that the balance that may remain from time to time in the various banks shall not be taken to be public moneys received by the Province, but shall be dealt with as provided in the said Act, being chapter 16 of the statutes of Alberta, 1909."

And that on the 9th November, 1909, an order in council was passed, which recited, amongst other things, that "it is the understanding of the said Government that under the proper interpretation of the said Act the said moneys, when so paid into the said banks respectively, not being public moneys received by the Province, can only be withdrawn as set out in the said Act," &c., and approved of the defendant bank for the deposit of $6,000,000, the Union Bank of Canada for $1,000,000, and the Dominion Bank for $400,000.

It is contended that there was constituted an agreement that the moneys should be deposited only to be withdrawn in the manner and on the conditions specified, and that the bank gave credit and agreed to pay interest on the faith of it. There appears to me to be a fallacy in considering that there was any agreement which could affect the terms of the deposit, they being fixed by the statute, and entirely beyond the control of any of the parties claimed to be contracting. This, however, does not meet the essence of the objection; for, by the terms of the statute, the moneys were to be paid out only as provided by the statute, which necessarily would be in instalments extending over a considerable period. It is perhaps significant that the argument on this point did not examine critically the details of the conditions of this deposit, which was referred to in general terms as a time deposit.

An examination of the Bank Act shews that the only classes of deposits referred to in it are deposits payable on demand and deposits payable after notice, or on a fixed day, which are specified in the schedule. A search through the recognised text-books on banking fails to reveal any reference to any class of deposit payable on an indefinite contingency such as the present; and I can only conclude that, not only is it not authorised by the Bank Act, but it is not even recognised by banking customs and practice. Paget refers to a current account, the moneys of which are, of

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course, payable on demand, and then deals with deposit accounts in ch. 3, which he says are of three classes: (1) repayable at call or on demand; (2) withdrawable on specified notice; (3) for a fixed period; and states that the customer has no right to draw cheques against 2 or 3, and probably not against 1. The deposit in such accounts, it would appear, are such as are evidenced by a deposit receipt issued by the bank. The deposit in the present case clearly does not come within either class 2 or 3 above mentioned, and apparently is not within the contemplation of 1; but, as far as banking practice is concerned, must be treated as a deposit to current account, and would, therefore, be payable on demand as far as the subject of banking is concerned, and the statute apparently, therefore, in no way affects the relation of the parties. It certainly does not, in this regard, conflict with any provision of the Bank Act, and does not deal with what is essential banking legislation, since, as indicated, such a conditional deposit has no recognition by banking practice.

Apart altogether from the statute in question, if the company and the Government agreed to abandon the enterprise, could the bank maintain that the money could not be taken out of its hands? Certainly the Courts would not countenance any such claim, and their decision would not be based on any Dominion law relating to banking, but on questions of property and civil rights; and, if it is urged that the Court would require some notice to be given, and we assume such to be the case, it clearly would be on the same ground, and the right to such notice could, therefore, be taken away by the legislature. The same conclusion would apparently be reached from a consideration of sec. 96 of the Bank Act, which relieves the bank from liability to see to the execution of trusts, and which would, therefore, seem to involve a duty to pay out to a trustee on his demand. See Gray v. Johnston (1868) L. R. 3 H L. 1.

It is urged that the Act purports to destroy a banker's lien, and is, therefore, invalid. It may be said that the Act does not contemplate any general application, and, therefore, does not purport to do any more than is necessary to give effect to its terms in the particular case; and, therefore, if, under the facts of this case, there was no lien, the statute does not purport to destroy any lien.

In Currie v. Misa, 1 App. Cas. at p. 569, one of the learned Lords in giving judgment declared that all moneys paid into a bank are subject to a lien, as well as documents. Inasmuch

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as the relationship established by a deposit of money is that of debtor on the part of the bank to the customer as creditor, Paget points out that it would be more logical to consider the right in respect of a deposit as one of set-off instead of lien. The distinction, however, is unimportant for the present consideration. It is apparent that the right of lien or set-off can apply only in respect of a claim against the customer, who is the bank's creditor. In the present case the Provincial Treasurer is the customer, and there is no suggestion of any claim by the bank against him or the Province. The only claim that is suggested as sufficient to support a lien is a claim of nearly $400,000 advanced by the bank to the construction company. If it may be suggested that the lien could attach to the construction company's interest in the money, it appears to me that the claim of lien cannot be established, because it is impossible to shew any interest in the construction company. Assuming an interest in the railway company which would support a lien for a claim against it, the assignment from it to the construction company does not purport to assign its interest, but to assign the very proceeds, but not until earned and payable under the terms of the Act, as is shewn by reference to the two documents dealing with the assignment above-mentioned. Even if it should be considered that the assignment did pass the interest of the railway company, the construction company having assigned in the same way to the bank, the bank could scarcely claim a lien against its own property.

There is the further consideration, also, on this point, that the banker's lien now being considered is not given or in any way dealt with by the Bank Act, but is a part of the provincial law relating to property and civil rights. As is pointed out by Maclaren on Banks and Banking, 2nd ed., p. 137, in the provinces where the common law is in force it is regulated by the law merchant, while in Quebec, where the civil law prevails, it is regulated by the terms of the Civil Code. It is thus not uniform throughout Canada, and undoubtedly a provincial law abolishing all liens would destroy a banker's lien, unless the Dominion Parliament saw fit to legislate on the subject. What has been said on the subject of lien applies almost equally to the objection that the bank's security by way of assignment has been destroyed.

As pointed out, the assignment has passed nothing, and, therefore, nothing has been taken away; and, in the same way as the lien, its validity and effect must depend on provin-

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cial law, even if we assume that such an assignment is not forbidden by the Bank Act, as to which some of the Judges in Rennie v. Quebec Bank, 1 O. L. R. 303, 3 O. L. R. 541, seemed to have some doubt.

The next objection to consider is that the Province has no right to confiscate private property for public revenue. The word "confiscate" is defined by the New Oxford Dictionary as meaning "to appropriate (private property) to the Sovereign or the public treasury." The word "confiscate," therefore, appears to be an apt word to apply to this legislation, without importing anything opprobrious; but the word itself involves an appropriation to the public treasury; and, if the Province has the right to confiscate, it must be for the benefit of the public revenue.

It is pointed out that provision is made in the British North America Act for raising a revenue by direct taxation and by licenses, also for subsidies from the Dominion to supplement the revenue, and that these means are impliedly all that are available to the Province. Without considering that these are all intended for annual income for current expenditure, in which they differ from the present, I can see no force whatever in the contention that by authorising certain things to be done for the purpose of raising a revenue, there is any reason to infer an intention that other things may not be done for the same purpose; but, if there could be any doubt, the statements which appear in various decisions of the Privy Council would remove it.

In Powell v. Apollo Candle Co. (1885), 10 App. Cas. 282, a statement is quoted from Hodge v. The Queen, 9 App. Cas. 117, with approval, and the statement is made on p. 290 that that case and Regina v. Burah, 3 App. Cas. 889, had "put an end to a doctrine which appeared at one time to have had some currency, that a colonial legislature is a delegate of the Imperial legislature. It is a legislature restricted in the area of its powers, but within that area unrestricted."

The quotation from Hodge v. The Queen is in part as follows: "When the British North America Avt enacted that there should be a legislature for Ontario, and that its Legislative Assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in sec. 92, it conferred powers not in any sense to be exercised by delegation from or as agent of the Imperial Parliament, but authority as plenary and as

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ample, within the limits prescribed by sec. 92, as the Imperial Parliament in the plenitude of its power possessed or could bestow. Within these limits of subjects and areas the local legislature is supreme, and has the same authority as the Imperial Parliament."

Several years later, in Attorney-General for Canada v. Attorneys-General for the Provinces, [1898] A. C. 700, in delivering judgment, Lord Herschell said: "The suggestion that the power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the Courts of any limits upon the absolute powers of legislation conferred. The supreme legislative power in relation to any subject-matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom the legislature is elected."

This last extract is quoted as authority for the conclusion reached in Florence Mining Co. v. Cobalt Lake Mining Co. (1909), 18 O. L. R. 275; and the Privy Council, in affirming the judgment (1910), 102 L. T. R. 375, though deciding on another ground, say they can find no fault with this view; and in the case of Rex v. Lovitt, to which reference has already been made, decided only a few months ago, reference is made to the hardships effected by the Act in question, and it is said (p. 224): "But these are considerations rather for the New Brunswick Legislature than for the law Courts; and, though the Courts will not easily adopt a construction leading to such results, if the language of the statute is explicit, effect must be given to it."

In view of these unqualified opinions, it must be concluded that the statement in the earlier case of Dobie v. Temporalities Board (1882), 7 App. Cas. at p. 151, "but that the Quebec legislature should have power also to confiscate these funds or any part of them for provincial purposes is a proposition for which no warrant is to be found in the Act of 1867," must be considered as limited to such cases as that one, and as referring only to property of corporations carrying on their business under Dominion authority, as would be the case if a legislature attempted to confiscate the bank's premises.

It is a matter of history that the Imperial Parliament has confiscated the property of rebels on numerous occasions, and the authorities quoted establish the Provinces' right to

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do what the Imperial Parliament can do in relation to the subjects over which it has authority. It is clear, therefore, that the right to confiscate private property over which the Province has jurisdiction, such as the moneys in question, belongs to the Province. As has been pointed out, an attempt to establish the justness of such legislation before the Court would be out of place, since its function is merely to determine the legal but not the moral validity of the Act.

For the reasons stated, I am clearly of the opinion that the Act in question is one which the Province had power to pass.

A number of other objections were taken, none of which, in my opinion, is entitled to prevail.

It is argued that this is an Act of a private nature, from which it follows that, if the recitals are not true, effect should not be give to it, and also that it binds only the persons named; and, as the construction company is not named, it is not bound. I cannot conceive on what ground the Court could arrogate to itself power to repeal an Act of the legislature which it had power to pass, on any such ground. If the legislature has been misled, and has done something in consequence, it has the power to correct the error; and, in my opinion, it alone can correct the error. As to the second point, even if we assume the Act to be a private one, which it is not, it may be noted that the plaintiff makes no claim against the construction company and the railway company, who are parties at their own request. They are simply claiming a particular fund in the bank's hands.

The most elementary rule of construction of an Act is, that effect must be given to the intention of the legislature, when it is clear from the terms of the Act; and the intention of this Act is so clear that it seems impossible to suggest any but the one intention, viz., to appropriate the deposit in the bank. As a matter of fact, however, the construction company's claim, if it has any, is as an assignee of the railway company; and it is, therefore, named in the Act under the terms "assigns" in sec. 2.

Then it is said that the title and recitals shew that the intention is only to pursue the ordinary legal rights of foreclosure for default, and the Act should be so construed. As I have just stated, the operative part of the Act shews clearly what the intention is, and it is not necessary to resort to the title or recitals to suggest something different.

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In The Sussex Peerage Case (1843), 11 Cl. & F. 85, at p. 143, Chief Justice Tindal says: "My Lords, the only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver. But, if any doubt arises from the terms employed by the legislature, it has always been held a safe means of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to Chief Justice Dyer (Stowel v. Lord Zouch, Plowden 369), is 'a key to open the minds of the makers of the Act, and the mischiefs which they intended to redress.'"

It is also argued that the moneys in the bank are not the proceeds of the sale of bonds, but only of one bond, because a single bond was delivered. If this were a proper construction, the construction company, at least, could have no interest to support in this action, for its interest is, as the agreement and assignment shew, in the proceeds of the sale of bonds. The fact appears, however, to be, that the bonds were sold, though they have not yet been delivered, but have only been executed; and the expression is, therefore, strictly accurate.

The learned Judge allowed interest on the deposit at 3½ per cent., the agreed rate up to the time of the demand; and at 5 per cent. after the demand, to which objection is taken. It is said that there was no agreement to pay 3½ per cent. to the province. This appears to me to be immaterial. There was an agreement to pay 3½ per cent. on this money, and the books of the bank shew that the interest was actually appropriated to the account. Even if it could be claimed that the railway company only could insist on this interest, the legislature, in forfeiting the company's right, has given the Province all the rights the railway company had, including this right to interest, which is specifically appropriated. It cannot be said that there was a failure of consideration for the bank's promise to pay interest either, even assuming the bank's promise to have been based on the conditions named in the letter of the 23rd October, 1909, for it did get the deposit, which was what it stipulated for, though it may not

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have been able to keep it as long as it had hoped, but this was not anything that the parties could promise, and the bank must be assumed to have known the Province's right to change the condition of the first Act and to have received the deposit on that understanding.

The allowance of interest afterwards is really by way of damages or indemnity for the deprivation the bank imposes on the Province. In my opinion, the rate of 5 per cent. is reasonable and proper, for it is the rate which the bonds bear, and which the Province is called on to pay, and notice that it would be claimed was given. It is suggested that, a claim having been made by the construction company, the bank was justified in leaving it to the Courts to decide the rights, and should, therefore, not be called on to pay a penalty.

There appears to be a complete answer to this in the fact that the bank has contested the plaintiff's claim at every point. If it had left the contest between the plaintiff and the other claimant, and paid the money into Court, it would have freed itself from liability in this respect; but, having taken the fight on its own shoulders and on its own behalf, it has no right to complain of the natural consequences.

On the application of the railway company and the construction company to be added as parties, no costs were granted, for the reason stated in the report, 17 W. L. R. at p. 519, that it was thought to be settled by the Privy Council in Johnson v. The King, [1904] A. C. 817, that the ordinary rule was, that there should be no costs as between the Crown and a private litigant; and the learned trial Judge made no order as to the costs of the action, for the same reason.

It appears, however, that in the case of Rex v. Lovitt, above referred to, the Privy Council gave the costs of the appeal to the Crown. Also in an appeal from this Court to the Supreme Court of Canada, decided since our decision in the application referred to was given, Alberta Railway Irrigation Co. v. The King, 44 S. C. R. 505, costs were given against the King, not merely on the appeal, but in the Court below, in which no order was made as to costs, by reason of counsel having intimated an agreement that there should be no costs. A further examination of the decisions of both the Privy Council and the Supreme Court of Canada, since



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Johnson v. The King, shews that almost invariably in both Courts costs have been given in actions between the Crown and a private litigant as in other cases. The fact stated with reference to the Supreme Court case shews that, in that case at least, costs could not have been asked, and that the case was dealt with in respect to costs as any ordinary case.

A further reference to Johnson v. The King shews that opposition was made to the granting of costs, and the point was argued.

Apparently we concluded that the rule stated in that case was of wider application than was intended, and the proper inference from the later cases would appear to be that, if the point is not raised, as is the case here, costs should go as in ordinary cases.

I think, therefore, the appeal should be dismissed with costs.

SCOTT, J.:—I agree with the conclusion reached by the other members of this Court, that the Act under which the plaintiff claims the fund in question (ch. 10 of 1910) is within the constitutional powers of the Legislative Assembly of the province.

In my view, the fund must be treated as property within the province. Under the statute ch. 16 of 1909 (which I will hereafter refer to as the Guarantee Act), and the subsequent agreement thereunder between the Provincial Government and the railway company, the fund was to be deposited in the branch of the defendant bank at Edmonton. and was to be paid out only in the manner provided by that agreement. It was so deposited and still remains there.

It was contended on behalf of the defendants that, even if it were held that the fund was property within the province, the bondholders who have an interest in it being without the province, and the Canada West Construction Company, which claims an interest in it, were not subject to the jurisdiction of the legislature, and that, in so far as it affects their interests, the Act is, therefore, ultra vires. I cannot agree with this contention. It would, in my view, be unreasonable to hold that the legislature could not legislate with respect to lands within the province in a manner which would affect the interests of the owner or others having an interest, merely because they were without the province and not personally subject to the jurisdiction of the legislature; and I can draw no material distinction between such a case

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and the present one. The view I have expressed upon this contention is supported by Osler, J., in his judgment in Jones v. Canada Central R. W. Co., 46 U. C. R. at p. 259, and I cannot find that the view he there expressed has ever been questioned.

I am also of opinion that, apart from the question raised by the defendant bank, the Act of 1910 was within the competence of the Legislative Assembly, by reason of its relating solely to a matter of a local nature. The railway company was incorporated by the Assembly for the purpose of constructing a railway within the province, and the fund in question was provided for the purpose of constructing that railway, and the statute deals only with that fund.

It was also urged on behalf of the defendants that the Act of 1910 was ultra vires by reason of its being confiscatory in its nature.

In my view, the fund in question was the property of the railway company. It was the proceeds of the sale made by the company of its bonds, which, under the Guarantee Act and the agreement under it, it was authorised to sell; and the only interest the Province had in the fund was to ensure that it should be applied in the construction of the railway. It was for that purpose, and that purpose alone, that the Provincial Treasurer was made the custodian of the fund. He was, therefore, merely a trustee thereof, and he cannot be said to have held it as Provincial Treasurer, or to have held it as moneys of the Province. The Act in providing that it shall form part of the general revenue fund of the Province, if effective, effectually deprives the railway company and its assignees of their interest in the fund; and, in that respect, it appears to be open to the charge that it is confiscatory. With the propriety of such legislation this Court has nothing to do; and I, therefore, do not express any opinion upon the point. Its legal aspect only can be dealt with upon this appeal. It appears, however, that the fact that the Act is confiscatory does not render it ultra vires. In Florence Mining Co. v. Cobalt Lake Mining Co., 18 O. L. R. 275, Riddell, J., in his judgment in the Court below, at p. 279, and Moss, C.J.O., in his judgment in the Court of Appeal, at p. 292, expressed the view that it was competent for a provincial legislature to confiscate property within its legislative jurisdiction, and the Privy Council in the same case, 102 L. T. R. 375, expressed its approval of that view.

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It was also urged on behalf of the defendants that the Act of 1910 was ultra vires, because it was in effect a means of raising a revenue for the Province which was not authorised by sec. 92 of the British North America Act—the only authorised means of raising revenue being by direct taxation and the issue of shop and other licenses.

Because the Act provides that the fund shall form part of the revenue fund of the Province, it does not follow that it is one for the purpose of raising a revenue. Its manifest scope and object is to protect the Province from loss by reason of its guarantee of the bonds of the railway company. The provision that it shall form part of the revenue fund does not imply that it shall be considered revenue in the ordinary acceptation of the term, viz., annual or other periodical receipts. Section 5 of the Treasury Department Act (ch. 5 of 1906) provides that all revenues whatsoever, however arising, or received, and over which the Legislative Assembly has power of appropriation, excepting moneys which may otherwise be specially disposed of by the legislature, shall form one general revenue fund, to be appropriated for the public service of the Province. As no other provision is made for the disposition of any moneys to which the Province is entitled, I think the reasonable construction to be placed upon the word "revenues" in that section was intended to include all moneys which the Province should receive from any source whatsoever, except as stated in that provision.

It was further contended by the defendant bank that the Act of 1910 is ultra vires because it is in effect banking legislation, and that it is in direct conflict with the Bank Act, R. S. C. 1906 ch. 29.

It is true that, under sec. 91 of the British North America Act, the Dominion Parliament has exclusve jurisdiction to legislate upon the subject of banks and banking. In my view, however, the Act of 1910, if otherwise within the competence of the Legislative Assembly, should not be held to be legislation respecting banks or banking, and therefore ultra vires, merely because it indirectly affects a particular bank in respect of one particular transaction.

Mr. Lefroy, in his work on Legislative Power in Canada, p. 416, states the following proposition: "The true nature and character of the legislation . . . —its ground and design and the primary matter dealt with—its object and scope, must always be determined in order to ascertain the class of subject to which it really belongs; and any merely

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incidental effect it may have over other matters does not alter the character of the law." A number of cases in Canadian Courts cited by the author support his proposition, and it appears to be a reasonable deduction from them. It is applicable to the present case, as the Act only incidentally affects the interest claimed by the defendant bank.

I have already expressed the opinion that, in dealing with property within the province, the legislature can deal with the interest of the owner or other person interested therein who is outside the province, or otherwise not subject to its legislative jurisdiction. Take, for instance, the case of the Canada West Construction Company, which claims and may have been entitled to an interest in the fund, subject to the claim of the defendant bank. That company was incorporated under a statute of the Dominion, yet it has not contended on this appeal, nor do I think it could successfully contend, that the legislature could not extinguish that company's interest in the fund, assuming that it is property within the province. In my view, the defendant bank is not in any better position with respect to the fund than the construction company. It is true that, under the Bank Act, banks are entitled to exercise certain privileges and powers which cannot be interfered with by a provincial legislature, such as the taking of security upon personal property for advances previously made, and it is shewn that the assignment of the fund in question was taken by the defendant bank by way of security. I think, however, that the assignment to the defendant bank must be held to have been taken subject to the power of the legislature to deal with the privileges and powers of the railway company under which company the defendant bank claims title to the fund. I think it is clear that the legislature might at any time revoke the charter of the railway company, and thus effectually prevent the construction of its railway, and as, under the Guarantee Act and the agreement thereunder between the railway company and the Provincial Government, and also under the terms of the assignment held by the defendant bank, the interest of the latter is dependent upon the construction of the railway being proceeded with, it would, I think, necessarily follow in such case that the bank could never acquire any interest in the fund. True, the legislature has not revoked the railway company's charter; but, if the Act of 1910 is effective, the legislature has, I think, effectually prevented the construction of the railway, by

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appropriating to the Province the fund which was provided for its construction. It has been held that a provincial legislature cannot do indirectly what it cannot do directly; and I see no reason why it cannot do indirectly what it can do directly.

It was also contended by the appellants that the Act of 1910 is ineffective, as it has not the effect of extinguishing the claims of those interested in the fund, they not having been named therein.

The defendants, other than the railway company, as assignees of that company's interest in the fund, are referred to in the Act with sufficient certainty, as it declares that the fund shall be free from the claims of that company and its assigns. The bondholders are the only other persons interested in the fund. They are not parties to the action, and it does not appear that they have ever claimed an interest in the fund; and I cannot see that it is open to the defendants to contend that the Act is ineffective as against their claims, merely on the ground that it may be ineffective as to the claims of others.

In my opinion, the learned trial Judge erred in awarding the plaintiff interest on the fund prior to the demand made upon the bank therefor after the passing of the Act of 1910. There was no agreement between the bank and the Government as to the payment of interest. There was an agreement between the railway company and the bank that the latter should pay interest upon the fund at the rate of 3½ per cent. per annum; but it must be assumed that the bank was aware of the terms of the agreement between the railway company and the Government, under which the fund was to remain in the bank and available for its use during the construction of the railway, and that at least a portion of it would so remain until its completion; and, in my view, it would be unfair to hold the bank liable for the payment of the interest, when the legislature has stepped in and deprived the bank of the benefit it had under that agreement.

For the reasons I have stated, I am of opinion that the judgment of the learned trial Judge should be amended by awarding to the plaintiff judgment for $6,052,088.26, with interest at five per cent. from the 16th December, 1910. There should be no costs of the appeal to either party.

BECK, J.:—The Alberta and Great Waterways Railway Company was incorporated by special Act of the legislature

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of Alberta, ch. 46 of the year 1909, assented to on the 25th February, 1909. By another special Act of the same legislature, ch. 16 of 1909, assented to on the same day, the Province was authorised to guarantee the payment of the principal and interest of bonds to be issued by the railway company.

On the 28th October, 1909, an agreement was entered into between the railway company and the Provincial Government for the construction of the railway.

On the same day a bond to the amount of $7,400,000 was issued by the railway company and guaranteed by the Provincial Treasurer on behalf of the Province. Also, on the same day, a mortgage to secure the payment of this bond and bonds to be substituted for it was made by the railway company to the Standard Trusts Company, a company incorporated by an Act of the legislature of Manitoba, and having its head office in Winnipeg, in that province.

The bond was sold, and the proceeds, $7,400,000, were paid to the three Canadian banks, as follows:—

| | |
|---|---|
| The Royal Bank of Canada ..... | $6,000,000 |
| The Union Bank of Canada ..... | 1,000,000 |
| The Dominion Bank ..... | 400,000 |

The Guarantee Act (sec. 5) provided that all moneys realised by sale, pledge, or otherwise of the railway company's guaranteed bonds should be paid directly by the purchaser, subscriber, pledger, or lender into a bank or banks approved of by the Lieutenant-Governor in Council, to the credit of a special account in the name of the Treasurer of the Province, or such other credit as the Lieutenant-Governor in Council might direct.

It was in pursuance of this provision of the Guarantee Act and of an order in council of the 9th November, 1909, that the above-mentioned payments were made.

The same section of the Act provides, in effect, that the amount from time to time at the credit of the special account shall be credited with interest at such times and at such rate as may be agreed upon between the company and the bank. The company and the bank did, in fact, arrange that the bank should charge interest at the rate of 5 per cent. per annum upon all advances and allow interest at the rate of three and a half per cent. on the amount of the deposit standing to the credit of the account; and this arrangement

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was made, apparently, without intervention by the Government.

The Guarantee Act (sec. 5) gave the railway company the choice of two methods for the payment out of the proceeds of the bonds, and they chose one which provided for payment as follows: "The moneys so paid into the said bank shall . . . be paid out to the company from time to time, upon the completion (except as to the ballast) of every section of ten miles of railway line . . . to the satisfaction of the Lieutenant-Governor in Council, according to the specifications fixed or to be fixed by contract between the Government and the company, and as certified upon the certificate of the engineer appointed by the Lieutenant-Governor in Council."

The bond was sold, through the agency of J. P. Morgan & Co., at New York, on the terms of one-quarter of the price being paid down and the balance in three equal monthly payments with interest. These payments were duly made, and the several amounts, to the extent of $6,000,000 and interest, were ultimately placed to the credit of "The Provincial Treasurer, Province of Alberta, Alberta and Great Waterways Railway Co. Special A/c," at the branch office of the Royal Bank, Edmonton, as follows:—

| | |
|---|---|
| 1909 | |
| Nov. 4 | $1,501,250 00 |
| Dec. 3 | 1,507,291 62 |
| 1910 | |
| Jan. 3 | 1,513,750 00 |
| Feb. 3 | 1,519,791 64 |
| making a total of | $6,042,283 26, |

which is the principal sum involved in this action.

On the 9th November, 1909, the Canada West Construction Company Limited was incorporated by letters patent issued under the (Dominion) Companies Act, with its chief place of business at the city of Winnipeg, in the province of Manitoba.

On the 22nd November, 1909, the railway company and the construction company entered into an agreement whereby the construction company agreed to construct the railway, which the railway company had, by agreement with the Provincial Government, agreed to build. The consideration for this agreement to construct was the agreement of the rail-

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way company: (1) to pay to the construction company the entire net proceeds of the guaranteed bond issue of $7,400,000, together with any cash subsidy that the railway company might receive from the Dominion Government; (2) to issue in favour of the construction company or its nominee fully paid-up stock of the railway company to the extent of $6,950,000; (3) to pay to the construction company or give credit to it in respect of any expenses incurred by it in the operation of the road during construction; (4) to pay to the construction company all revenues of the railway company, from whatsoever source derived, and all interest that the railway company might receive in respect of the proceeds of the bonds while on deposit during construction.

The agreement contained the following clauses:—

"The payments of the proceeds of the said bonds shall be made when and as the same are payable to the railway company under the terms of the said in part recited agreement (that is the railway company's agreement with the Province for the construction of the road) and statutes of the Province of Alberta."

"For the purpose of more fully effectuating and carrying out the intention of the parties hereto, the railway company assigns, transfers and sets over, as and when the same shall be earned and payable, to the construction company, the proceeds of the said bond issue and the said cash subsidy, if any, to be paid to the railway company by the Government of the Dominion of Canada."

The construction company immediately set about carrying out the work of construction; a Mr. Waddell was engaged as chief engineer; a plan and profile of the road with a book of reference were prepared and submitted to the Government for approval; some surveying of the route and some work of clearing it and some grading were done. The plan, profile, and book of reference were submitted to the Government on the 23rd February, 1910.

On the 8th March, 1910, the railway company executed a separate assignment to the construction company of, "when and as earned, under the terms of the statutes in that behalf and the agreement for the construction of the railroad, etc., the proceeds of the $7,400,000 issue of the bonds." On the same day, the construction company executed an assignment to the Royal Bank of Canada in the following form: "Know all men by these presents, that we, the Canada West Construction Company Limited, being indebted to the

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Royal Bank of Canada, and contemplating being further indebted to the said bank, for advances made to us in the ordinary course of business, have assigned, transferred and set over, and by these presents do assign, transfer and set over, unto the said bank, as collateral security for the said advances, all the proceeds payable to us, as and when earned, of the bonds of the $7,400,000 issue of bonds of the Alberta and Great Waterways Railway Company, guaranteed by the Province of Alberta, which proceeds are payable to us under and by virtue of an assignment or assignments from the Alberta and Great Waterways Railway Company to us."

Notice of these two assignments was given to the Government, and its receipt was acknowledged on the 12th May, 1910.

A session of the provincial legislature opened on the 10th February and closed on the 26th May, 1910 (see statutes of 1910). At this session the action of the Government in relation to the arrangement with the railway company was severely criticised, with the result that the Government resigned a day or two before the close of the session.

A second session of the legislature was held the same year, from the 10th November to the 16th December. At this session an Act was passed intituled, "An Act respecting the bonds guaranteed for the Alberta and Great Waterways Railway Company, being an Act to specify certain defaults of the railway and the consequent rights of the Province" (ch. 9 of 1910, 2nd session), which was assented to on the 16th December, 1910. This Act reads as follows:—

"Whereas the Alberta and Great Waterways Railway Company heretofore applied to the Legislature of the Province of Alberta to guarantee its bonds, and

"Whereas the Legislature of the Province of Alberta did, by an Act passed in the year 1909, chapter 16, and intituled 'An Act to Provide for an Issue of Guaranteed Securities of the Alberta and Great Waterways Railway Company' (assented to February 25th, 1909), authorise the guarantee by the Province of the bonds of the Alberta and Great Waterways Railway Company to the extent of $7,400,000, and

"Whereas bonds of the railway, to the amount of $7,400,000, have been executed by the said company, secured by a mortgage in favour of the Standard Trusts Company, payment of which bonds the Province of Alberta has guaranteed, and

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"Whereas the bonds hereinbefore referred to have been sold, but the said company has made default in payment of interest thereon, and the Province of Alberta has paid the said interest so in default, and

"Whereas the said company has made default in the construction of its line, and

"Whereas certain proceeds of the said bonds (viz, to the amount of their par value together with accrued interest) are now lying to the credit of the Provincial Treasurer or otherwise in certain banks as follows:—

"In the Royal Bank of Canada, $6,000,000 and interest;
"In the Union Bank of Canada, $1,000,000 and interest;
"In the Dominion Bank, $400,000 and interest.

"Therefore His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Alberta, enacts as follows:—

"1. The Province of Alberta hereby ratifies and confirms the guarantee by it of the said bonds, and the Treasurer of Alberta is hereby empowered and instructed to execute a guarantee on behalf of the Province of said bonds.

"2. The whole of the proceeds of the sale of the said bonds and all interest hereon, including such part of the proceeds of said sale as is now standing in certain banks in the name of the Treasurer or otherwise, as follows, viz.:—

"$6,000,000 and accrued interest in the Royal Bank of Canada;

"$1,000,000 and accrued interest in the Union Bank of Canada;

"$400,000 and accrued interest in the Dominion Bank;

"is hereby declared to form part of the general revenue fund of the Province of Alberta, free and clear of any claim thereon or thereto by the Alberta and Great Waterways Railway Company, their successors or assigns; and, together with all accrued interest thereon, shall, to the extent to which they are so held, be forthwith paid over by the banks hereinbefore recited, and by any other person holding any part thereof, to the Treasurer of the Province, without any set-off, counterclaim, or other deduction whatsoever.

"3. Notwithstanding the form of the said bonds and the guarantee thereof, the Province of Alberta shall, as between itself and the Alberta and Great Waterways Railway Company, be primarily liable upon the said bonds to the several holders thereof, and the Province shall indemnify and save

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harmless the railway company and its assets and undertaking from any and every claim made under the said bonds or any of them."

On the 16th December a written demand was made by the Provincial Treasurer upon the Royal Bank of Canada as follows: "I hereby notify you that the statute intituled 'An Act respecting the Bonds guaranteed for the Alberta and Great Waterways Railway Company, being an Act to specify certain defaults of the railway and the consequent rights of the Province,' which was passed by the Legislative Assembly of the Province of Alberta at the session thereof which ended to-day, has this day received the Royal Assent and is now in force. I beg to hand you herewith a certified copy of this statute. And further take notice that the King, represented herein by the Province of Alberta and by me, as the Treasurer of the said Province, and I as such Provincial Treasurer, hereby demand payment from you to the undersigned of the sum of $6,042,083.26, amount of deposit; together with accrued interest on the said sum of $6,042,083.26, computed to date, being the whole of a certain deposit now lying in the following account at your Edmonton branch: 'The Provincial Treasurer, Province of Alberta, Alberta and Great Waterways Railway Company, special account.' And interest thereon as above. This claim is made in pursuance of all rights, claims, and title which the Crown holds to said fund in any manner whatsoever, including the title held by the Crown under the said statute. A cheque drawn by me on you for the said sum of $6,042,083.26, in favour of the Imperial Bank of Canada, will be presented to you by the said bank, and the payment of the same by you will be considered by me a payment of that amount on account of the sum hereby demanded."

On the same day a cheque was presented to the bank in accordance with the intimation contained in the foregoing notice. Payment was refused, and thereupon a further notice was given by the Provincial Treasurer to the bank as follows: "Take notice that the King, represented herein by the Province of Alberta and by me, the Treasurer of said Province, and I as such Provincial Treasurer, claim that you have wrongfully refused to honour the cheque of the Provincial Treasurer drawn in favour of the Imperial Bank of Canada, covering certain moneys now lying to his credit in your Edmonton branch in the following account: 'The Provincial

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Treasurer, Province of Alberta, Alberta and Great Waterways Railway Company, special account.' And that, on demand duly made by the Crown and by me, you have wrongfully neglected and refused to pay over the moneys lying to the credit of said account, and the accrued interest thereon, or any part hereof. And further take notice that the Crown and the Provincial Treasurer will claim against you interest at the rate of 5 per cent. per annum from this date on the aggregate amount of principal and interest this day owing by you in connection with the above account."

On the same day—the 16th December—this action, an action of debt on the statute, was commenced. The claim was for $6,253,868.01, with interest at 5 per cent. per annum from the date of the writ. This amount was calculated as follows:—

| | |
|---|---|
| Amount received by the bank on a/c of the proceeds of the bond ..... | $6,042,083 26 |
| Interest at 3½ per cent. compounded half-yearly ..... | 211,784 75 |
| | $6,253,878 01 |

The Alberta and Great Waterways Railway Company and the Canada West Construction Company Limited were, on application, added as parties defendant. Each of the defendants defended, and the case went to trial before Stuart, J., who directed judgment to be entered for the plaintiff for the amount claimed, with interest at the rates claimed.

This is an appeal from that judgment.

The validity and effectiveness of the last-mentioned Act is questioned.

Primarily, the defendants contend that it is invalid, inasmuch as it attempts to invade rights which are matters to which "the exclusive legislative authority of the Parliament of Canada extends," by virtue of the British North America Act, sec. 91, clause 15, "Banking, the incorporation of Banks, and the issue of paper money," and the concluding words of that section: "And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces." The Crown, on the other hand, contends that the Act in question is not invalid, inasmuch as it pur-

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ports to deal with matters in respect of which the legislature of the province "may exclusively make laws," by virtue of sec. 92, clause 10, "Local works and undertakings," or clause 13, "Property and civil rights in the Province," or clause 16, "Generally all matters of a merely local or private nature in the Province." In order to appreciate the force and effect of the arguments founded on these two views, it seems to be necessary, in the first place, to consider and ascertain the position and rights of the bank in respect of the moneys in their hands. Deposits upon trust are, of course, quite fully recognised by the general law of banking, and the Bank Act fully recognises such deposits, by expressly dealing with the subject. Section 96 is as follows: "The bank shall not be bound to see to the execution of any trust, whether expressed, implied or constructive, to which any deposit made under the authority of this Act is subject. 2. Except only in the case of a lawful claim, by some other person before repayment, the receipt of the person in whose name any such deposit stands, or, if it stands in the names of more than two persons, the receipt of a majority of such persons, shall, notwithstanding any trust to which such deposit is then subject, and whether or not the bank sought to be charged with such trust, and with which the deposit has been made, had notice thereof, be a sufficient discharge to all concerned for the payment of any money payable in respect of such deposit. 3. The bank shall not be bound to see to the application of the money paid upon such receipt."

Independently, apparently, of any such statutory provision, the House of Lords held in Gray v. Johnston, L. R. 3 H. L. 1, in effect, what is there put by Lord Westbury as follows: "A banker is bound to honour an order of his customer with respect to the money belonging to that customer which is in the hands of the banker, and it is impossible for the banker to set up a jus tertii against the order of the customer, or to refuse to honour his drafts, or on any other ground than some sufficient one arising from an act of the customer himself. Supposing, therefore, that the banker becomes incidentally aware that the customer, being in a fiduciary or representative capacity, meditates a breach of trust, and draws a cheque for that purpose, the banker, not being interested in the transaction, has no right to refuse the payment of the cheque; for, if he did so, he would be making himself a party to an inquiry as between his customer and

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third persons. He would be setting up a supposed jus tertii as a reason why he should not perform his own distinct obligation to his customer."

The bank, there seems no doubt, as far as the receipt of the moneys is concerned, received them in its ordinary capacity of a bank and in an ordinary and recognised course of business. The bank became debtor to whom? Who was its customer? The answer, it seems to me, is, the Provincial Treasurer; and he was a trustee of the moneys, upon the trusts indicated by the Guarantee Act, and the agreement between the railway company and the Province—the beneficiary of the trust being the railway company only, unless default on its part occurred; but, in that event, also the Province and the trust company as representing the bondholders; for, in my opinion, the terms of the mortgage in reference to "the mortgaged premises" must be interpreted as intended to include the railway company's "rights" in respect of the proceeds of the bonds.

It is fairly evident that mistakes have occurred in the printing of the latter part of sec. 5 of the Guarantee Act, and that there should be a period after the word "nominees" in the 6th line from the end of the section, and that the remainder of the section should read as follows: "Pending the completion of the said respective lines and terminals, the balance at the credit of such special account shall until (not "when") paid out as above provided for, be deemed part of the mortgaged premises under said mortgage, and shall not be taken to be public moneys received by the Province."

The same words correctly printed appear in ch. 14, sec. 6, and ch. 15, sec. 6, of the statutes of the same year.

The result seems to me to be, that, dismissing from consideration for the moment any other circumstances, the Provincial Treasurer, as the bank's customer, might, immediately after the deposit, have demanded from the bank—whether by cheque or not is unimportant—payment to him of the entire amount of the deposit. And the contingency of such a demand might have arisen had the railway company and the Government come together and agreed to rescind their agreement for the construction of the road and to abandon the project altogether. Did anything take place to change this situation? For on behalf of the bank it is contended that the moneys in question were not "payable on de-

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mand" (see sec. 112, sched. D. 4), but either "payable after notice or on a fixed day" (ib. 5), or on the terms and conditions indicated by the Guarantee Act and the agreement between the railway company and the Province, supplemented perhaps by the agreement between the bank and the railway company, in whom it is contended the property in the moneys lay. And then the argument proceeds that, these moneys being held by the bank on terms other than that they were "payable on demand," and the contract to that effect being one which the bank could lawfully make, the Provincial Act declaring them to be payable forthwith is ultra vires as infringing upon the rights of the bank; jurisdiction over which lies exclusively, in such a matter as this, with the Dominion Parliament. If it were considered that these moneys were held by the bank upon the last-mentioned terms and conditions, a difficult question of law might arise as to what would be the implied terms—for some are expressed—of the holding, in the event of those terms and conditions, instead of being fulfilled, being not complied with. I have, however, already indicated my opinion that the Provincial Treasurer was the bank's customer and creditor; that it was he, and not the bank, who was the trustee for those having various interests in the moneys; that, as between him and the bank, the moneys could be withdrawn on demand; and that, therefore, if they ceased to be liable to be so withdrawn, it must have been owing to something occurring subsequent to the deposit. It is contended that such a condition was brought about by the assignment of the moneys by the railway company to the construction company, and by the latter's assignment to the bank, and the fact of the bank making advances to the construction company upon the security of those assignments; and, this being so, the Act in question is an attempt to deprive the bank of a security which, as an essential of the business of banking, the bank had a right to take. This contention, however, it is obvious, it seems to me, finds a complete answer, if it be correct to say, that the Provincial Treasurer was alone the customer and the creditor of the bank with regard to these moneys; that he alone was the trustee of them for the railway company, the construction company, and the Government, according to their several interests as beneficiaries; and that assignees of the beneficiaries merely acquired their rights—the right of the bank as an assignee, obviously, in no way affecting the position of the

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Provincial Treasurer; except, of course, in substituting another party to whom he was liable to account, namely, the bank, whose position in this respect was in no sense peculiarly that of a bank, but merely of an ordinary assignee of chose in action or contingent claim, by a method of assignment not specially applicable to banks, and a transaction, therefore, subject to legislative authority of the provincial legislature.

An argument against this view was based upon the words, "excepting only in the case of a lawful claim," occurring in sec. 96 and like words occurring in sec. 95, but both decisions and the provisions of the Act itself appear not only to protect the bank against the claims of beneficiaries, but oblige the bank to disregard them, leaving such claims to be protected by legal proceedings to be taken by the beneficiaries against the trustee for either an anticipated or actual breach of trust; and, it seems to me, therefore, that the lawful claim referred to is intended to be one not arising by dealings, which recognise the trust, with beneficiaries whose assignee can be in no better position than they, but a conflicting and paramount claim. It was contended, too, that, by virtue of the terms of the Guarantee Act, inasmuch as it provides for the payment into a bank to be named by the railway company and approved by the Government, and of the order in council fixing upon a particular bank, and nothing being provided with regard to payment out, there was no power in the Government to disapprove of this bank, and so entitle the Provincial Treasurer to withdraw the moneys, except on fulfilment of the terms and conditions of the agreement between the railway company and the Government.

This, if it be so, appears to me, however, to be matter relating to the terms of the trust, and consequently not affecting the bank as the depositary of the moneys, though it may affect it as the assignee of one of the beneficiaries; but that status is not, as is evident, a status in any way peculiar to a bank.

Then it is contended that the Act in question in ultra vires because, in confiscating the fund in the hands of the bank, it assumes to declare it "to form part of the general revenue fund of the Province of Alberta," shewing that the Act is one for the purpose of raising a revenue—a thing, it is contended, which can be accomplished only in one or



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other of the methods authorised or provided by the B. N. A. Act, or the Alberta Act (1905) 4 & 5 Edw. VII. ch. 3.

It was pointed out that the Treasury Department Act (ch. 5 of 1906, Alberta) shews that "revenue," in the expression "General Revenue Fund," has a much wider meaning than perhaps the ordinary use of the word suggests.

Section 1 (e) says: "The expressions 'public revenue,' 'revenue,' and 'public money,' respectively, mean all revenue and public moneys arising from any source whatever, whether such revenue and such moneys belong to the Province, or are held by the Province, or collected or held by the officers of the Province for, or on account of, or in trust for any provinces forming part of the Dominion, or for the Dominion or for the Imperial Government or for any other party or person."

Section 5 says: "All revenues whatever, however arising or received, over which the Legislative Assembly of the Province has power of appropriation, excepting moneys which may otherwise be specially disposed of by the legislature, shall form one general revenue fund to be appropriated for the public service of the Province."

The chief sources of revenue authorised or provided for by the B. N. A. Act or the Alberta Act are:—

(1) Subsidies (Alberta Act, secs. 18, 19, 20);

(2) A share of the properties of the former North-West Territories (ib., sec. 22);

(3) Direct taxation (B. N. A. Act, sec. 92, clause (2);

(4) Licenses (ib., clause 9).

There are undoubtedly others—the sale of public lands and timber, in the event, which seems likely, of the Province acquiring any (B. N. A. Act, sec. 92, clause (5) ); fees for the incorporation of companies (ib., clause 11); and also such as may at any time arise by reason of provincial legislation authorised under the general heads "Local Works and Undertakings" (clause 10), "Property and Civil Rights" (clause 13), and "Matters of a merely Local or Private Nature" (clause 16).

The forfeiture of lands to the Province for non-payment of taxes, would, I fancy, fall under one or other of these clases of subjects, and afford a source of revenue, in the wide sense of the term, as used in the Act impeached. An instance of such a forfeiture will be found in Re Calgary and Edmonton Land Co., 2 Alta. L. R. 446; affirmed, sub nom.

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Calgary and Edmonton Land Co. v. Attorney-General for Alberta, 32 C. L. T. 91.

The Act in question, if it does not offend against the Bank Act—and I have already stated my conclusion that it does not—must, in my opinion, fall within the legislative authority of the provincial legislature, under all or some or one of the three headings mentioned; and, if so, it seems to me, there can be no legal objection to it merely because, in its result, it becomes a source of revenue to the Province, in the wide acceptation of that term.

One other ground of objection is taken to the validity of the Act in question, namely, that, assuming that the Act is properly to be deemed one relating to 'Local Works and Undertakings," "Property and Civil Rights," or "Matters of a merely Local or Private Nature," each of these classes of subjects are in the B. N. A. Act restricted, the first by implication, the two others expressly by the words "in the province;" and, though it may be true that much of what is dealt with and affected by the Act is within the province, yet in the result it would affect, if not property, at least civil rights existing beyond the province, namely, for instance, the rights of the bondholders; and it is urged that the case of Dobie v. Temporalities Board, 7 App. Cas. 136, is authority for the position that the authority of the provincial legislature does not extend to such a case. That case, however, was a case where some not merely of the civil rights, but of the property involved was beyond the limits of the province. Where the entire property is within the province, it seems to me, concurring as I do with the opinion of Osler, J., in Jones v. Canada Central R. W. Co., 46 U. C. R. 250, that the legislative authority of the provincial legislature is not excluded, even though civil rights having in law an extra-provincial situs are incidentally also affected.

The only remaining question which, it seems to me, calls for consideration, is the interest at 3½ per cent. agreed to be allowed by the bank.

This was an arrangement made, as I have pointed out, not with the Provincial Treasurer, whom I have held to be the customer and the creditor of the bank, but with the construction company, a beneficiary under the Provincial Treasurer. This being so, it seems to me that it was a transaction not essentially relating to banking nor covered by any provision of the Bank Act; and that it is, therefore, one subject to the authority of the provincial legislature. The Guar-

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antee Act expressly contemplates interest arising on the fund, and the forfeiting Act can only refer to interest so arising.

The result is, that, in my oipnion, the Act which is impeached in this action is not ultra vires of the provincial legislature, and is effective according to its purport.

I cannot, however refrain from adding, in conclusion, that I have a strong repugnance to the Act on ethical, political, and economic grounds, and that it is with so much regret that I feel constrained to come to the conclusion which I have expressed, that I should be glad to find that the conclusion is wrong.

The result, however, as I now view the various questions involved, must be that the appeal should be dismissed.

SIMMONS, J.:—The appellants, the Royal Bank of Canada, the Alberta and Great Waterways Railway Company, and the Canada West Construction Company, contend that the statute of Alberta of 1910 is ultra vires because:—

(a) It invaded the field of Dominion legislation, to wit, the Bank Act of Canada, in that it changes a time deposit into a demand deposit, and also it purports to take away from the bank a security the bank had on the deposit by way of lien for advances made to the Canada West Construction Company Limited, assignees of the Alberta and Great Waterways Railway Company, or, in the alternative, it took away from the bank a security for advances made to the construction company on the security of an assignment to the bank by the construction company of the interest of the company in said moneys when earned by them.

(b) That it purports to raise a revenue by a method which is not direct taxation.

(c) The Act purports to deal with property and civil rights outside of the province, and consequently beyond provincial legislative control, and does not, therefore, come within sub-sec. 16 of sec. 92 of the British North America Act, as dealing with "generally matters of a merely local or private nature within the province."

The general rules of construction for determining whether any particular subject of legislation comes within the exclusive jurisdiction of Dominion legislation, as defined under the heads of sec. 91 of the British North America Act, or the exclusive jurisdiction of provincial legislation, under sec. 92.

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or under the class of subjects to which the term "overlapping of the respective Dominion and provincial legislation" applies, has been defined on frequent occasions by the Law Lords of the Privy Council.

The full extent to which Dominion legislation will extend its arm is aptly put in Tennant v. Union Bank of Canada, [1894] A. C. 31, where it is laid down that "the legislation of the Dominion Parliament, so long as it strictly relates to the subjects enumerated in sec. 91 of the British North America Act, is paramount authority, even though it trenches upon the matters assigned to provincial legislatures under sec. 92;" while, on the other hand, the plenary powers of the provincial legislatures, in matters distinctly assigned to the provinces under sec. 92, are exemplified in Attorney-General of Manitoba v. Manitoba License Holders Association, [1902] A. C. 73. The last case is a clear exposition of the doctrine that once a subject is clearly a matter of a merely local nature in the province, within the meaning of sub-sec. 16 of sec. 92 of the British North America Act, then the jurisdiction of the provincial legislature is paramount, even though in its practical working out the provincial legislation must necessarily interfere with matters allocated to the Dominion field. The Manitoba Liquor Act interfered with Dominion revenue, a subject exclusively reserved to the Dominion under sec. 91; and, indirectly at least, interfered with business operations outside the province, and also with the trade and commerce of the Dominion, although these subjects are specifically reserved under sec. 91. Lord Macnaghten in this judgment observes: "Matters which are substantially of local or private interest in a province—matters which are of a local or private nature from a provincial point of view—are not excluded from the category of matters of a merely local or private nature because legislation dealing with them, however carefully it may be framed, may or must have an effect outside the limits of the province, and may or must interfere with the sources of Dominion revenue and the industrial pursuits of persons licensed under Dominion statutes to carry on a particular trade. Its primary and essential feature is the suppression of the liquor traffic in the province."

In Bank of Toronto v. Lamb, 12 App. Cas. 586, the same principle is enunciated. The question under review was, whether a tax imposed by the Quebec legislature upon banks was ultra vires, on the ground that it trespassed upon the

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Dominion field, which was, under sub-sec. 15 of sec. 91, reserved to the Dominion, "Banking, incorporation of banks, and the issue of paper money." The general rule is laid down by Lord Hobhouse as follows: "To ascertain whether or not the tax is lawfully imposed, it will be best to follow the method of inquiry adopted in other cases: first, does it fall within the description of taxation allowed by class 2 of sec. 92 of the Federation Act, viz., 'direct taxation within the province in order to the raising of a revenue for provincial purposes;' secondly, if it does, are we compelled by anything in sec. 91 or the other parts of the Act to cut down the full meaning of the words in sec. 92 that they shall not cover this tax? This bank is found carrying on business there, and on that ground alone it is taxed. . . . There is no attempt to tax the capital of the bank any more than its profits. The bank itself is directly ordered to pay a sum of money. . . . Whether the method of assessment is sound or unsound, wise or unwise, is a point on which their Lordships have no opinion, and are not called on to form one, for, as it does not carry the taxation out of the province, it is for the legislature and not for the Courts of law to judge of its expediency. . . . If they find that, on the due construction of the Act, a legislative power falls within sec. 92, it would be quite wrong of them to deny its existence, became by some possibility it may be abused, or may limit the range which would otherwise be open to the Dominion Parliament."

The general rule of interpretation to be followed was clearly set out by Lord Fitzgerald, delivering the opinion of the Board, in Hodge v. The Queen, 9 App. Cas. 117, namely, that the British North America Act conferred powers as plenary and as ample, within the limits prescribed by sec. 92, as the Imperial Parliament in the plenitude of its power possessed and could bestow.

The examples quoted above illustrate the general rules adopted by the Board, that, in order to ascertain to which class a particular legislative Act belongs, the true nature and character of the Act must first be determined.

It is not seriously contended that the Acts of the Legislature of Alberta, viz., chs. 46 and 16 of 1909, are ultra vires of the Province. The legislature, in order to encourage the building of a railway into the northern part of the province, incorporated certain persons as a company with power to construct a line of railway from Edmonton to Fort McMur-

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ray, as set out in ch. 46. In order to assist the railway company in financing the scheme, the legislature enacted ch. 16, providing for the guaranteeing of the bonds of the railway company to the extent of $20,000 per mile, and $400,000 for terminals at Edmonton. These enactments surely come within sub-sec. 16 of 92 as "matters of merely local or private nature within the province."

Section 20 of ch. 46 goes so far as to provide that the Government may, at its option, purchase the whole undertaking of the company, including all its rights, franchises, powers, real and personal property, at a fair valuation as a going concern.

The Guarantee Act, being ch. 16 of 1909, provides for the absolute control by the Lieutenant-Governor in Council of the forms and terms of the bonds and mortgage securing the same; for the payment of the proceeds of sale of the bonds to be paid into a bank or banks approved by the Lieutenant-Governor in Council to the credit of a special account in the name of the Provincial Treasurer; also, that the balance at the credit of the special account shall be credited with interest at such times and such rate as may be agreed upon between the company and the bank holding the same; it also provides two alternatives as to the times and manner of payment out, under sec. 5, either of which may be selected at the option of the company.

The appellants, the Royal Bank of Canada, in the course of their banking business, agree to receive a part of the purchase-price of these bonds and to pay out the moneys so received in accordance with this Act and with the orders in council issued thereunder by the executive of the province. They do so with full knowledge that the company (and all rights, powers, and privileges of the company) is the creature of the provincial legislature and liable at any moment to have all its rights, powers, franchises, moneys, and even its existence, determined by the same power which created it. To assert anything less, it seems to me, would do violence to the rule laid down again and again by the Privy Council, namely, that the scheme of legislative distribution contemplated that the powers of the Canadian legislatures, each in its sphere, are plenary powers of legislation. "Jurisdiction conceded, the will of the legislature is omnipotent according to British theory and knows no superior:" Hodge v. The Queen, 9 App. Cas. 117. The "jurisdiction conceded" is a

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mixed question of law and fact, and it is the duty of the Courts to define the jurisdiction.

The contention of the appellants that the legislature, in purporting to deal with the moneys in the bank, as a matter solely under provincial jurisdiction, has infringed upon the rights and powers conferred upon the bank by the Bank Act (ch. 29 of R. S. C. 1906) could only be effective if (a) the subject-matter has ceased to be merely local or provincial and has become a matter of national concern so as to bring it within federal jurisdiction; or (b) that, while still a matter of essentially local or provincial concern, the legislature has, by way of incidental or ancillary legislation, encroached upon the Dominion field.

Look upon it from whatever view point you may, the provincial company and the provincial liability cannot be brought within (a) as a matter of national concern. The money was obtained on the credit of the province; the purpose was the construction of a provincial railway; the Act required the money to be deposited in the name of the Provincial Treasurer, and to be paid out by him only as provided by the Act and the orders in council thereunder. Surely, if any matter could be essentially a matter of local or provincial concern, this was one.

The crux of the matter is, apparently, whether it comes under (b) as legislation upon a matter of merely local or provincial concern, but which incidentally has gone too far and trespassed upon the federal jurisdiction. The argument of counsel for the appellants was principally directed to the substantiation of this contention. It is said that the bank has a lien on the deposit for moneys advanced to the construction company, that the bank has an assignment by the construction company of these moneys to secure their advances—that a time deposit has been turned into a demand deposit—that the legislature, in seizing upon the moneys, has deprived the bank of a security for advances made by the bank. Section 77 of the Bank Act provides that the bank shall have a privileged lien for any debt on the shares of its own capital stock and any unpaid dividends of the debtor or person liable to the bank. The bank may not retain these shares, but must sell them within twelve months. Section 78 provides for the sale by the bank of stocks, bonds, debentures, or securities held as collateral securities. Section 96 provides that "the bank shall not be bound to see to the execution of any trust, whether express, implied, or constructive, to which

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any deposit under the authority of the Bank Act may be subject." Sub-section 2 of the same section provides that, "except only in the case of a lawful claim by some person before repayment, the receipt of the person in whose name the deposit stands shall be a sufficient discharge."

Section 95 indicates one such lawful claim, viz., a claim was made upon money deposited by a person under disability as to contracting; other lawful claims might arise in the case of an executor or administrator provided for in sec. 97, and other lawful claims might arise out of attachment proceeding or executions against the depositors' funds.

The banks are the recognised mediums of transmission of moneys from one place to another; they are largely the depositaries of the savings of the people, and largely the mediums of payment between traders and their customers. The Parliament of Canada, in the above sections, have provided that the bank shall have special privileges and special immunities, in the matter of receiving and paying out of the moneys of customers. Parliament has thus recognised that the banks, being the medium of circulation of moneys, should be, as far as possible, untrammelled in their transactions, especially in the matter of paying out moneys deposited by customers. The Federal Parliament did not deem it necessary that a banker's lien on moneys or securities deposited with it should have any special rights or privileges. The banker's lien, then, is a common law right arising out of the law merchant.

In Brandas v. Barnett, 12 Cl. & F. 786, it was held that the general lien of a banker is part of the law merchant, and is to be judicially noticed, like the negotiability of bills of exchange. It does not arise upon securities deposited with it for a special purpose.

In Davis v. Bowsher, 5 T. R. 591, Lord Kenyon says: "Bankers have a general lien on all securities in their hands for their general balance, unless there is evidence to shew that any particular security was received under special circumstances which would take it out of the common rule." Falconbridge on Banks and Banking says: "The general lien exists only for debts due the bank."

In Foley v. Hill, 2 H. L. C. 28, the relation of a banker and his customer is defined: "The money paid into the banker's is money known by the principal to be placed there for the purpose of being under the control of the banker; it is then the banker's money; he is known to deal with it as his own. . . . He is, of course, answerable

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for the amount, because he has contracted, having received that money, to repay to the principal an equivalent sum to that paid into his hands."

There is no doubt but that the position of the Provincial Treasurer was that of trustee for the contingent interest of the company in the money, as and when earned, and also for the Province, which was liable on the guarantee, and also interested in seeing that the moneys were used for the purpose provided in the Guarantee Act. The Guarantee Act specially provided that the money should be paid into a bank designated by order in council. There was plainly a power in the Executive to take the whole or part of the moneys out of any particular bank and place it in another. There was provision for the contingency that the company might not implement its undertaking to construct the road, and the right was reserved to both the bondholders and the Province to foreclose upon the works of the company. There was the contingency that the company might go into compulsory winding-up proceedings. The Province, wisely, I think, for its own safety against these contingencies, provided that the money should be deposited in a bank to the credit of its own Treasurer, and subject to the will of its own Executive, as to time and manner of paying out, not inconsistent with the Act.

In the face of this, the bank proceeded to enter into an arrangement with the construction company, the assignee of the railway company, whereby the bank agreed to make advances to the construction company and take an assignment of the interest of the contruction company in these moneys as and when earned. The bank does not contend that any of the moneys were earned, in the sense that any sum ever became due and payable out of the fund to the construction company. The appellants say, however, that, having made this bargain with the construction company, and having advanced moneys, they became ipso facto entitled to a prior lien or equitable claim, even as against the province The logical result of such a contention would be, that the bank might have advanced to the construction company the whole $7,400,000, on the security of their assignment, and, in the event of the construction company making default in their undertaking, the bank would step in and say, "We are entitled to the money, as we advanced it on the security of our assignment, and, if the Province

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does not pay us our money advanced out of the fund in their possession, it will be robbing us of our security and contravening rights enuring to us under a federal Act, and therefore the Act of the Province is ultra vires."

The appellants completely fail to indicate any intention in the Bank Act dealing with such a banker's lien. They insist, however, that their assignment from the construction company is a security which they are entitled to take under the Bank Act—the Bank Act has prohibited the bank from taking certain classes of securities—this is not in the prohibited class—therefore, the Bank Act has authorised the taking by the bank of such a security. I do not for a moment dispute their contention that they were within their rights and within the legitimate scope of banking business in taking security on what was plainly a contingent interest of the construction company. Such interests are by law assignable. Their assignment from the construction company says "and when earned," while the assignment from the railway company to the construction company recites, "do assign, transfer and set over, when and as earned, under the terms of the statutes in that behalf, and the agreement for the construction of the railway made," etc. The assignment to the bank cannot transfer anything beyond what the assignment from the railway company to the construction company contained, so far as transferring an interest in the moneys.

The appellants are driven back to the statutes of 1909, and the agreement therein authorised, as the creator and author of whatever potentially attaches to their assignment. But, before the appellants are upon firm ground, they are driven to asserting that the provincial legislature, having created an expectancy which is of some value and the property in which has passed to the bank by way of collateral security, cannot extinguish its own creation, because in so doing it will trespass upon the claims of the bank, a creature of Dominion creation and powers.

The fallacy of this contention seems to me to lie in this —that the application of such a rule would reduce the powers of the provincial legislature to such an extent as to make it a subsidiary and dependent institution, subservient on every hand to the federal power, whenever any provincial legislative act created conditions which brought about any business relations or transactions of the provincial subject and the federal subject. Such a narrow limitation of

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provincial powers would defeat the whole scheme of the Act, which was essentially a division of legislative jurisdiction.

The appellants' claim that a time deposit was changed into a demand deposit fails on the same ground. The Guarantee Act and the orders in council issuing thereout fixed the conditions of the deposit, and in no manner did the legislature indicate that the deposit should remain in any one particular bank or be subject to any conditions arising out of contractual relations between the company and any bank receiving the deposit, save that the rate of interest was to be such as agreed upon between the bank and the company. It is urged by the appellants that Mr. Rutherford, Provincial Treasurer, and Mr. McLeod, his deputy, were parties to the agreement whereby the bank agreed to make advances, and that these advances were to be made in consideration of the bank receiving the deposit. Neither Mr. Rutherford nor his deputy had any power to alter the conditions of the deposit, either by way of contractual relation or otherwise. Neither could the Executive Government deal with it except as authorised by the statute.

The plea that the Act of 1910 is ultra vires because it is a means of raising a tax by indirect taxation and unauthorised under sub-sce. 2 of sec. 92, does not seem to me tenable.

The Act impugned is essentially a confiscatory Act, in the sense that it takes away from the railway company and its assignee, the construction company, rights and interests created by the Province and arising directly from the provincial legislation of 1909. The statute of the province, as indeed the statutes of all the provinces of Canada, contain legislation in abundance of a confiscatory character, affecting property and civil rights in the province, with the result that the owner is divested of his ownership and possession, both of which pass to the Province. Having conceded legislative jurisdiction over property and civil rights, the plenary power inherent in the provincial jurisdiction includes necessarily the lesser power to confiscate. But, though the confiscated property vests in the Province, it does not follow that the confiscatory Act comes within sub-sec. 2 of sec. 92, as being direct taxation within the province.

The evidence of ex-Premier Rutherford indicates that the legislation of 1909 was the subject of agitation and criticism both within the legislature and with the public,

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during the session of 1910—that there had been a general election in the meantime, and that the executive over which he presided had resigned.

The Act itself, even outside of this, seems to indicate clearly the intention of the legislature, namely, that the moneys arising out of the sale of the railway company's bonds, and for which the Province was liable, should be removed from the control of the railway company and its assigns, and that the said companies should be divested of all rights and interests therein, and the railway company relieved of any liability thereon.

Section 5 of the Act of 1906—an Act respecting the Treasury Department—recites that all revenues, from whatever source arising, over which the Legislative Assembly has power of appropriation, shall form one general revenue fund. The public accounts of the Province indicate many sources of revenue which do not arise out of direct taxation or licenses. These all go into the general revenue fund.

The claim of the appellants that the Act affected property and civil rights outside the province was not so strongly urged before this Court as the claim that the Act infringed upon banking legislation. The debt was incurred by the Province through its own legislative act, the money was on deposit in a bank at the city of Edmonton, and was there for the purpose of being paid out in accordance with the statute and orders in council issuing thereunder, and the same reasons which I have indicated as applying to the claim that it was banking legislation apply here. The different parties whose residence or place of business happened to be outside the province must be presumed to know the law and deal with the Province with the full knowledge that any substantive rights or interests which the Province can create can be taken away by the Province. The assumption that the legislative acts cannot be valid so far as affecting the rights of extra-territorial persons or companies, which said rights have arisen out of provincial acts, or contracts, arising thereout, made by the Province with non-resident persons or companies, if once assented to, would go much farther and would invalidate the whole transaction—to wit, the sale of the bonds outside the province—the assignment by the railway company, a provincial concern, to the construction company, a Dominion concern, and the incorporation by the legislature of Mr. Clarke and others, non-residents

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of the province, as a railway company to carry on business in the province.

The appellants say, however, that the Act is invalid because the recitals as to default made by the company are untrue. The authorities are clear that this Court cannot impugn the recitals of fact by the legislature.

Chief Justice Robinson, in City of Toronto and Lake Huron R. W. Co. v. Crookshanks, 4 U. C. R. at p. 318, observes: "So far as this Act is concerned, the legislature stating the fact is conclusive." To impugn the truth of the recitals by the Court would be an unwarranted assumption by the Court of legislative jurisdiction. The tribunal to deal, with this subject, so far as passing upon the good faith of the recital, is the electorate of the province.

In regard to the question of interest, it resolves itself into a mixed question of law and fact, viz., did the bank, in pursuance of an agreement with the construction company, credit the principal moneys deposited with it, with interest from time to time, so that the interest became a part of the fund which the construction company could legally insist as against the bank should be paid out to the company in pursuance of the guarantee Act? The Guarantee Act provides "that the balance at the credit of the special account shall be credited with interest at such times and at such rate as may be agreed upon between the company and the bank holding the same, . . ." and that "the balance, if any, of the proceeds of such bonds which may remain after the completion of the said lines of railway and Edmonton terminals shall be paid over to the company or its nominees." The Act of 1910 does not further describe the amount of interest, but describes it as "accrued interest" The Court must decide what the amount of "accrued interest" is. The only evidence of an agreement between the bank and the construction company by which rate of interest and times of credit of the same are fixed is the letter of Mr. Neil, the general manager, of the 23rd October, 1909, to Bertrand R. Clarke, the president of the construction company. The Act having left the matter of rate of interest and times of credit of the same to be agreed upon solely by the bank and the construction company, Mr. Neil quite properly specified what this agreement should be. Mr. McMillan says: "There were no credits of interest . . . that the items under the heading of interest in red ink are

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an estimate of our profits . . . and that there has been nothing credited to the account." This is part of the plaintiff's case, and the plaintiff has put in exhibit 5, which is the ledger sheet referred to by the witness. The memorandum at the top of exhibit 5 is "allow 3½ per cent."

The learned trial Judge has not found as a matter of fact whether interest was credited to the account in pursuance of Mr. Neil's letter of the 23rd October or not. I think a fair interpretation of the letter of Mr. Neil of the 23rd October, 1909, is this—the bank will pay 3½ per cent. on the deposit, under certain conditions stipulated for in the letter. The plaintiff (respondent), submits Mr. McMillan's evidence that the bank has not received the collateral advantages, and this is one reason why the conditions of the deposit have not been carried out. The evidence from which it is contended that a different conclusion should be drawn is the fact that the entries in red ink are computations at the rate of 3½ per cent., which would be credits for interest if the bank carried out its part of the agreement. The plaintiff (respondent) has made the evidence in this regard of Mr. McMillan and exhibit No. 5, as explained by him, a part of its case, and it seems to me that it is bound by it, in the absence of any contradictory evidence.

It appears to be quite consistent with the terms of the Guarantee Act that the legislature intended that the construction company should have the interest on these deposits while the road was under construction for the purpose of retiring a part at least of the interest which was accruing on the bonds during construction, and not for the purpose of being added to the fund which was to be paid on the ten mile estimates.

Section 5 of the Guarantee Act provides that the account may be dealt with in alternate ways, and the company selected the second alternative. The first alternative says: "The balance at the credit of the special account or accounts shall be credited with interest at such times and at such rates as may be agreed upon between the company and the bank holding same, and the said balance shall from time to time be paid out to the company or its nominee in monthly payments;" while the alternate plan selected by the company says: "The moneys so paid into the bank shall be paid out. . . ." Then follows the general provision:

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"The balance, if any, of the proceeds of such bonds which may remain after the completion of the said lines of railway and Edmonton terminals shall be paid over to the company or its nominees."

The last clause quoted would clearly, in a grammatical sense, apply to either alternative; but, as the last one was selected, it governs it in regard to the payment out "of the moneys so paid into the bank." The result is, that, if the first alternative of payment had been selected by the company, provision was made for the payment of the balance (principal and interest) in monthly payments, while the second method selected by the company provides only for payment out of "the moneys so paid into the bank," and no provision is made for the payment out of interest which may have been added from time to time on the balance, unless it is taken to be included in the general clause, "The balance, if any, of the proceeds of such bonds . . . the completion of the said respective lines and terminals."

My conclusion is, that the judgment appealed from should be varied in regard to the items of interest, from the dates of the different deposits to the date of passing of the Act of 1910. The question of interest subsequent to that date was in the discretion of the trial Judge, and should not be disturbed.

The result is, that there will be judgment for the plaintiff for $6.042,083.26 and interest at 5 per cent. thereon from the 16th December, 1910.

In accord with the judgment of this Court on the interlocutory application herein, there will be no costs to the respondent, and the appellants, having failed on the main part of their appeal, should have no costs.

*In the result, appeal dismissed.*

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CORRECTION.

In Richardson v. Ramsay, ante 566, and Sutherland v. Rhinhart, ante 584, JOHNSTONE, J., did not sit in the Court *en banc.*

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